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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

EDMUND C. SHERIDAN, *Appellant*,

v.

ALFRED GARDNER, et al., *Appellees*.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the decree of the Superior Court of Massachusetts, entered on September 16, 1964, in accordance with the rescript and opinion of the Massachusetts Supreme Judicial Court, entered February 6, 1964. The decree vacated a preliminary injunction previously granted by the Massachusetts

Superior Court in favor of the Appellant, and denied the declaratory relief requested by the Appellant. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The decree of The Superior Court is unreported, and appears in Appendix B hereto. The opinion of The Supreme Judicial Court of Massachusetts is reported in 1964 Adv. Sh. 229. Copies of this opinion are attached hereto in Appendix B.

JURISDICTION

This suit was brought under Massachusetts General Laws (Ter. Ed.) C. 231A for a declaratory judgment and ancillary relief. The Massachusetts Superior Court reported it for determination of questions of law by the Supreme Judicial Court upon an agreed statement of facts. The Supreme Judicial Court entered judgment and rescript on February 6, 1964. In accordance with this rescript The Massachusetts Superior Court entered a decree on September 16, 1964. The jurisdiction of The United States Supreme Court to review this decision on appeal is conferred by Title 28, United States Code, Section 1257(2). The following cases sustain the jurisdiction of the Supreme Court to entertain this appeal: *Lathrop* v. *Donohue*, 367 U.S. 820, 824-5, rehearing den. 368 U.S. 871; *Williams* v. *Bruffy*, 96 U.S. 176, 183; *Lawrence* v. *State Tax Commission*, 286 U.S. 282-3.

The appeal is timely, notice of appeal having been filed in the Superior Court on May 5, 1964. The time

for docketing has been extended successively, by order of the Massachusetts Superior Court, to October 23, 1964, by reason of delay in the Court's framing and filing a final decree. Rule 13(i), United States Supreme Court.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Whether a state legislative commission which has reported, pursuant to its statutory duty, that it cannot recommend legislation until the persons guilty of wrongdoing have been named and convicted, and which is authorized to present evidence to the grand jury, can compel the cooperation of witnesses without violating the due process clause of the Fourteenth Amendment.

(2) Whether Resolves 1962, c. 146, of the Commonwealth of Massachusetts, enacts a bill of attainder, in violation of Article I, Section 10, of the United States Constitution, by disqualifying from membership on a legislative commission "any member of the immediate family" of a person convicted of a felony, gaming offense or any misdemeanor involving moral turpitude.

(3) Whether the vagueness of the terms "organized crime" and "corrupt practices," used to define the scope of a state legislative investigation, offends the due process clause of the Fourteenth Amendment, when witnesses are compelled to testify under the threat of contempt procedures and penalties.

STATUTE INVOLVED

Chapter 146 of the Massachusetts Resolves of 1962 is set forth in Appendix B hereto.

STATEMENT

On September 13, 1963, the Appellees, purporting to act as the Massachusetts Crime Commission, caused to be served on the Appellant a summons directing him to appear, bring documents, and testify before the Commission on September 16, 1963. The date was later extended by agreement to October 16, 1963.

The subject concerning which the Appellant was subpoenaed to give evidence and produce documents was his knowledge "relating to the existence and extent of corrupt practices in government at state and local levels in the Commonwealth." Without limiting the breadth of the foregoing, the subpoena included the following particular areas: "the deposit of funds of the Department of Public Works, the State Treasurer, and the Metropolitan Transit Authority with the [material deleted by order of the Superior Court]."

Appellant thereupon filed a petition in the Superior Court for Suffolk County, which was amended by permission on October 11, 1963. Appellant sought equitable relief in the form of a temporary restraining order (and, after hearing, a preliminary injunction) to restrain respondents from interfering with Appellant in any way and from requiring his attendance at any hearing of the alleged commission. Appellant further sought a binding declaration under Mass. G. L. c. 231A of the right, duty, status and other legal relations of Appellant and Appellees. The Attorney General was notified of the proceedings in accordance with the provisions of G. L. c. 231A, sec. 8 and entered his appearance therein.

The petition set forth, as a basis for the relief sought, various grounds including those derived from the

Constitution of the United States. The petition specifically alleged (inter alia) that the enabling legislation was void: (1) by reason of vagueness in violation of the due process clause of the Fourteenth Amendment in the use of the phrase "organized crime . . . and corrupt practices" in describing the scope of the authorized investigation; (2) by enacting a bill of attainder, in violation of Article I, Section 10, through legislative disqualification from membership on the Commission of any "member of the immediate family" of persons convicted of a felony, gaming offenses, or any misdemeanor involving moral turpitude; and (3) by authorizing a legislative investigatory agency to present evidence to a grand jury, thus commingling legislative investigatory and non-legislative prosecutory functions in violation of the due process clause of the Fourteenth Amendment.

Issue was joined on these questions and the case was reported to the Massachusetts Supreme Judicial Court without decision by the Superior Court. All of the material facts were incorporated in an agreed statement of facts. The Appellant's claims based on the United States Constitution were briefed and argued before the Supreme Judicial Court. In the course of the oral argument, counsel for each side made reference to the Second and Third Reports of the Massachusetts Crime Commission. The Chief Justice requested copies and, by subsequent order of the Superior Court, they have been made a part of the Record.

The Second Report (May 22, 1963) includes these statements: "If and when evidence of corruption by an individual is discovered by the Commission, it is the duty of the Commission to make it available for

grand jury action." (p. 2) "If The Commission is not given enough money for an all out program it will not be able to do more than continue limited investigations which give little promise of getting at the heart of the problem by the exposure and punishment of the key persons who are responsible for the corruption at state levels." (p. 9)

The Third Report (December 2, 1963) contains this statement:

> The Commission has a primary duty to report to the General Court any corrupt practices that its investigations may uncover and to recommend remedial legislation. It is not yet ready to do so. Its reports of corrupt practices and its recommendations for remedial legislation will not carry weight unless the existence and nature of corruption can be shown by naming the persons who have geen guilty of corrupt practices and by describing the patterns of their corruption. *This cannot be done until their guilt has been proven by their conviction."* (Emphasis supplied.)

On February 6, 1964 the Supreme Judicial Court filed an Opinion and entered a Rescript directing the Superior Court to vacate the preliminary injunction and to enter a declaratory judgment in accordance with the Opinion.

The Opinion rejected all of the grounds urged by the Appellant, including the federal constitutional claims. The decree was entered by the Superior Court, on September 16, 1964, and expressly declared that the restrictions on qualifications of members of the Commission did not violate Article I, section 10; that the Resolve creating the Commission did not create "any new criminal offense," and the words "corrupt

practices in government" are sufficiently definite to satisfy the Fourteenth Amendment; and that the Fourteenth Amendment is not violated merely because "the work of the Commission may result in a showing that some individuals have committed crimes." In failing to declare concerning the specific argument of the Appellant based upon the prosecutory powers and purposes of the Commission, the Superior Court followed the Opinion of the Supreme Judicial Court which refused to rule on this issue at this time.

Before the decree was entered, the Appellees filed a motion to dismiss the case as moot, asserting that they "do not now intend to cause any summons to be issued to the petitioner requiring said petitioner's appearance or testimony before the Commission on any matter presently under investigation by the Commission." This motion was opposed by the Appellant and the motion was denied on September 16, 1964, no evidence having been presented in support of the motion.

THE QUESTIONS ARE SUBSTANTIAL

The questions in this case are substantial because the record reveals substantial deviations from constitutional norms, carried out in a context in which political safeguards are notoriously lacking.

1. The mingling of investigatory powers and prosecutory powers in legislative commissions raises a substantial issue of due process. Appellant is not asking the Court to enforce a state's own notions (or federal notions) of separation of powers. However, fundamental fairness, as demanded by due process, sets limits on the use of inquisitorial techniques in public prosecution. *United States* v. *Icardi*, 140 F. Supp. 383 (U.S.D.C., D.C.).

This Court has adverted to the problem in *Quinn* v. *United States*, 349 U.S. 155, 161, but has not previously been presented with a case which requires an application of the due process clause of the Fourteenth Amendment rather than the stricter limitations of federal separation of powers. Furthermore, previous decisions of the Court have failed to give a clear answer whether state legislative investigatory bodies may exercise powers not related to the legislative process. *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 561 (Douglas, J. concurring).

In the instant case a legislative Commission, given the duty to investigate and report to the legislature, has declared that its *first task* must be to prosecute and obtain convictions. In this inquisitorial role it has been aided by legislative authorization to present evidence directly to a grand jury. The deliberate failure of the Massachusetts Supreme Judicial Court to deal with this point, raised and argued by the Appellant, is a refusal to recognize a federal constitutional right as a ground for declining to appear before the Commission.

It is submitted that the declared purpose of the Commission to secure convictions before reporting findings to the legislature, and to use its special powers to that end, raises a substantial question whether these combined inquisitorial and prosecutory roles violate due process and destroy the competence of the Commission. See *Uphaus* v. *Wyman*, 360 U.S. 72, 82-108 (Brennan, J. dissenting).

2. The Appellant has been issued a summons to appear before a Commission created by a legislative Resolve which embodies a bill of attainder. The legislative declaration that members of the immediate

family of persons convicted of felonies and specified misdemeanors, has the practical effect of including innocent persons in the guilt incurred by their kin for past offenses. This Court has held that disqualification from office can be a punishment within the prohibition against bills of attainder in Article I, Section 10 of the Constitution. *Ex parte Garland,* 4 Wall. 333; *United States* v. *Lovett,* 328 U.S. 303. A claim that the exclusion from office is merely the setting of reasonable qualifications will not prevent a finding that a bill of attainder has been enacted. *Cummings* v. *Missouri,* 4 Wall. 277.

The substantiality of the violation of the federal Constitution in this case is made apparent by the fact that the disqualification from office is extended not only to a class of persons who have committed wrong, *but to their innocent family members.* This is a bill of attainder with a variety of corruption of blood (and marriage). If innocent persons cannot be disqualified from public office (see: *Garner* v. *Board of Public Works of the City of Los Angeles,* 241 U.S. 716) the invidious disqualification based upon the accident of family membership must be unconstitutional. *Wieman* v. *Updegraff,* 344 U.S. 183.

It is not claimed that the appellant is one of the class of persons disqualified from membership on this Commission. However, this is a situation in which the question could never be raised and the constitutional violation could never be terminated unless a party in the position of the appellant is allowed to raise this issue. In this respect the case is like *Barrows* v. *Jackson,* 346 U.S. 249. Persons within the excluded class would have no standing to raise the issue because they could not show they would otherwise have been appointed.

Unless one summoned as a witness can raise the issue, it will go unanswered. In this context a witness has the most concrete interest in the constitutionality of the enabling statute or resolve. See: *School District of Abington Twp.* v. *Schempp*, 374 U.S. 203. It is submitted that there is a substantial federal constitutional question whether one can be compelled to appear before a Commission which has been created and manned under a legislative enactment barring innocent persons who happen to be family relatives of convicted persons.

3. A substantial constitutional issue arises by reason of compulsory process being used to compel attendance at a government investigation into a subject which is inadequately defined, being described merely as "corrupt practices." This delegation to the Commission is so broad that the legislature could not have ascertained a public need for the information being sought. *Sweezy* v. *New Hampshire*, 354 U.S. 234. By compelling attendance the Commission is interfering with liberty of the Appellant, and the terms of the enabling Resolve are too vague to reveal a justification.

Moreover, the Resolve has the effect of defining a new crime, because attendance and testimony can be compelled as in criminal cases. Under Massachusetts law this exposes the witness to criminal punishment for contempt. See: *Corcoran* v. *Comm.*, 335 Mass. 29. Although enforcement is only by judicial order, the Resolve is so vague as to provide no standard by which a court can judge the propriety of the subject or scope of a Commission investigation, or the propriety of individual questions. *Watkins* v. *United States*, 354 U.S. 178. See: *United States* v. *Rumely*, 345 U.S. 41.

It is submitted that the liberty of citizens should be protected against improper compulsory process and this case raises a substantial issue of infringement through the grant of vague investigatory powers.

Even if The Superior Court subsequently narrows the rage of inquiry open to the Commission, this cannot correct the vagueness in the statute. The Petitioner, upon receipt of the summons, is faced with the necessity of deciding whether or not to appear. The opinion and rescript of the Supreme Judicial Court, followed by the decree of the Superior Court, expose him to criminal and civil contempt penalties should he fail to heed the call of the Commission.

Any subsequent narrowing of the scope of inquiry cannot be used to correct or change the defects of vagueness without partaking of the nature of an ex post factor law. *Bowie* v. *City of Columbia*, 378 U.S. 347. What must be kept in mind is that the summoned witness is called to a double duty: to appear, and to respond to questions. The first interference with his liberty, compulsory appearance, occurs before any opportunity will arise to give further definition to the scope of the enquiry. The situation parallels that in which a party is required to take a vague oath and will be punished if he violates it. *Baggett* v. *Bullett*, 377 U.S. 360. In the adjudication of alleged violations, the meaning of the oath may be defined and narrowed, but an abridgement of freedom will have already occurred in requiring the taking of the oath.

The decree in this case becomes res judicata in Massachusetts and forecloses further attack on the summons. *Sadler* v. *Industrial Trust Co.*, 327 Mass. 10; *Sadler* v. *Industrial Trust Co.*, 327 Mass. 759.

In this respect the case is clearly distinguishable from *Reisman* v. *Caplin*, 375 U.S. 440, where a forum was left open for challenges to the summons. Appellants constitutional claims cannot be heard again in Massachusetts.

CONCLUSION

It is submitted that the decree of the Massachusetts Superior Court subjects the Appellant to compulsory process issued by a Commission which is incompetent by reason of (1) the vagueness of the legislative resolve which created it, (2) the unconstitutional disqualifiaction of innocent persons from membership, and (3) the combination in its charter (and in its declared program) of legislative investigation with criminal prosecution. We believe that the questions raised by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A

Opinion of Mass. Supreme Judicial Court

EDMUND C. SHERIDAN

v.

ALFRED GARDNER & others.

WILKINS C. J. This bill for declaratory relief has been reported without decision by a judge of the Superior Court upon the pleadings and a statement of agreed facts amounting to a case stated. Further proceedings have been stayed, and the defendants enjoined from taking further steps to procure the attendance of the plaintiff as a witness, as hereinafter discussed. The prayer for declaratory relief is vague. It asks a binding declaration "of the right, duty, status and other legal relations" of the parties.

Seven defendants are the members of the commission (sometimes called Massachusetts Crime Commission) appointed by the Governor pursuant to Res. 1962, c. 146, and the remaining two are their counsel. The plaintiff is a resident of Boston upon whom on September 13, 1963, service was made of a paper, in form a summons, by sergeant of the State police. The summons was directed to the plaintiff at the Department of Public Works to appear before the commission on September 16. It required the plaintiff "to give evidence of what you know relating to the existence and extent of corrupt practices in government at state and local levels in the Commonwealth and in particular to the following: the deposit of funds of the Department of Public Works, the State Treasurer, and the Metropolitan Transit Authority with the . . . [name of bank deleted by order of Superior Court] and you are further required to bring with you all correspondence, memoranda, records, or writings of any sort pertaining to the deposit of funds of the Department of Public Works at the" said bank. On the reverse side of the summons are printed "The Rules of Procedure Governing the Con-

duct of Hearings Before the Massachusetts Crime Commission."

The plaintiff has never appeared before the commission. He raises numerous questions under the State and Federal Constitutions assailing the validity of the commission and of its summons. The Attorney General has been notified in accordance with G. L. c. 231A, § 8.

1. This is a suit against individual members of a board and their counsel, and is neither in form nor in substance, against the Commonwealth. Most obviously, it is not within the holding of *Executive Air Serv. Inc.* v. *Division of Fisheries & Game*, 342 Mass. 356, where declaratory relief was sought as to land of the Commonwealth, which was a necessary party. See *Demetropolos* v. *Commonwealth*, 342 Mass. 658, 661. See also *Moneyweight Scale Co.* v. *McBride*, 199 Mass. 503, 505-506, *S. C.* (appeal dismissed) 223 U.S. 749; *Commonwealth* v. *Norman*, 249 Mass. 123, 130-131.

2. It is objected that the resolve violates art. 30 of the Declaration of Rights in that it authorizes the executive department to exercise a legislative power in appointing the members. We do not agree. The first paragraph of the resolve reads: "That an unpaid special commission to consist of seven members appointed by the governor is hereby established to investigate and study as a basis for legislative action the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels, the existence of conditions which tend or may tend to prevent or interfere with the proper enforcement of the laws relating thereto, the existence of physical, legal and policy limitations on the powers and functions of those charged with the duty of enforcement of said laws and the extent to which the power of the government of the commonwealth in relation to the enforcement of said laws may or should be properly exercised at state and local levels."

The power to fill vacancies is in the Government, who shall from time to time designate one of the members as chairman.

The resolve also provides: "The commission shall report to the general court annually on or before the first Wednesday in December in each year the results of its investigations and study and its recommendations, if any, together with drafts of legislation necessary to carry such recommendations into effect by filing the same with the clerk of the senate and shall file a final report not later than the last Wednesday in June, nineteen hundred and sixty-five. The commission shall also file a copy of each such report with the governor."

In *Attorney Gen.* v. *Brissenden*, 271 Mass. 172, the entrusting of a legislative investigation to a member of the executive department, namely, the Attorney General, was held not to violate art. 30. At page 181, it was said by Chief Justice Rugg, speaking for the court: "The ascertainment of pertinent facts as the basis for legislation is within the power of the law making department of government. When a legislative body has a right to do an act, it must be allowed to select the means within reasonable bounds. It is not precluded from delegating incidental powers which it may exercise itself in aid of its primary functions but which do not partake of the nature of law making. Authority to obtain information necessary for its determination concerning the exercise of the power to enact laws may be conferred upon nonlegislative bodies .... Where facts are necessary as a basis for legislative action, the General Court may ascertain them in any reasonable way. Familiar methods are by appropriating the results of studies already made by itself or by others, by conducting an inquiry through a committee of its members, or by utilizing an existing commission or board to make and report the results of a research."

The product of the work of the commission would be a reasonable source of information to the Legislature, which

still would have the exclusive power to decide what, if any, legislation should be enacted. There is nothing in art. 30 which requires that investigations in aid of possible legislation should be conducted in whole, or in part by members of the General Court. Indeed, the right of petition guaranteed by art. 19 of the Declaration of Rights conclusively points to the contrary. See, similarly, the First Amendment of the Constitution of the United States.

It is common knowledge that legislation frequently is proposed by a Governor and by other executive officers of the State. The Acts and Resolves over the years contain hundreds of examples where the Legislature has exercised its powers to conduct investigations, obtain facts, and receive reports through commissions and specified officers and boards. In the very many instances the Governor has appointed a majority of the members of a commission. In a large number there have been no legislative members. In others the commissions created, or the boards designated, by the Legislature were empowered to hold hearings and to make report to the Legislature with drafts of recommended legislation. Res. 1947, c. 53. Res. 1949, cc. 28, 34, 46, 48. Res. 1950, cc. 46, 56. Res. 1951, c. 64. Res. 1952, cc. 71, 77. Res. 1961, c. 22. Res. 1962, cc. 86, 120. Res. 1963, c. 144.

Appointment of members of a legislative recess commission by the Governor was approved in *Opinion of the Justices*, 302 Mass. 605, 620. In *Brown* v. *Russell*, 166 Mass. 14, 25, it was said that the Legislature, barring a constitutional limitation on its power, could confer power of appointment to offices created by it upon public officers or boards. This statement was quoted with approval in *Bradley* v. *Board of Zoning Adjustment of Boston*, 255 Mass. 160, 165.

3. The conferring of the power to summon does not affect the validity of the Legislature's delegation of au-

thority to the commission.[1] In *Attorney Gen.* v. *Brissenden*, 271 Mass. 172, 183-184, it was said, "There are numerous instances, in the actions of the General Court, where power has been vested in courts to compel the attendance and the giving of testimony by witnesses before boards, commissions and other bodies exercising quasi judicial powers or powers of inquiry as to facts. . . . The court is ever solicitous to maintain the sharp division between the three departments of government as declared by art. 30 of the Declaration of Rights. . . . But that bound has not been overstepped by the present resolves. We are of opinion that the question, whether the defendant may be compelled to testify before the plaintiff as to the matters disclosed on this record, is judicial in its nature. The provision of the resolves authorizing this court to compel the defendant to give testimony is a vaild exercise of legislative power and confers jurisdiction to act."

There is no merit in the assertion that art. 30 of the Declaration of Rights is violated because a discretion in the courts to refuse an application enables the judiciary to prohibit the Legislature from examining particular witnesses or posing particular questions.

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[1] In the fourth paragraph of the resolve it is provided: "The commission may require by summons the attendance and testimony under oath of witnesses and the production before it of books and papers relating to any matter being investigated by it pursuant to the provisions of this resolve. Such a summons may be issued by the commission only upon a vote of the commission and shall be served in the same manner as summonses for witnesses in criminal cases issued on behalf of the commonwealth and all provisions of law relative to summonses issued in such cases shall apply to summonses issued under this resolve so far as applicable. Any justice of the supreme judicial court or of the superior court may upon application by the commission compel the attendance of witnesses summoned as aforesaid and the giving of testimony under oath before the commission in furtherance of any investigation under this resolve in the same manner and to the same extent as before said courts."

4. The second paragraph of Res. 1962, c. 146, contains the following: "No member shall hold any public office except that of justice of the peace or notary public or be a member or employee of any political committee. Not more than four of said members shall at any one time be members of the same political party. No person who has been convicted of a felony, gaming offense or any misdemeanor involving moral turpitude, *nor any member of the immediate family of any such person,* and no person who has served as a member of . . . [a previous crime commission] *shall be eligible for for appointment to the commission*" (emphasis supplied).

(a) The plaintiff contends that the italicized words constitute a bill of attainder and an ex post factor law in violation of art. 24 or art. 25 of the Declaration of Rights and of art. 1, § 10, of the Constitution of the United States. "The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt. . . . The mark of an *ex post factor* law is the imposition of what can fairly be designated punishment for past acts." *De Veau* v. *Braisted,* 363 U.S. 144, 160.

From the italicized words read in context, it is clear that the Legislature was directing its sights at the qualifications of the members with a view to enabling the creation of a commission which would impart an innate idea of independence and integrity and with the purpose to instill a public sense of security and confidence in a body to which was to be confided authority in sensitive areas. See *Brown* v. *Russell,* 166 Mass. 14, 17, 25-26; *Ross* v. *Crane,* 291 Mass 28, 33. There was plainly no intent to declare guilt or to impose punishment. See *Garner* v. *Board of Pub. Works of Los Angeles,* 341 U.S. 716, 722; *Flemming* v. *Nestor,* 363 U.S. 603, 613-616.

We are equally of opinion that no guilt was declared or punishment imposed. More than one class of persons were barred. It is not contended that holders of public office,

members and employees of political committees, and members of former crime commissions could not properly be excluded, nor that the number of members of a political party could not be limited. No suggestion of declaration of guilt or of punishment for crime can be made as to them. The exclusion of persons convicted of felonies, gaming offences, and misdemeanors involving moral turpitude does not establish an unreasonable qualification for membership. *Hawker* v. *New York*, 170 U.S. 189. *De Veau* v. *Braisted*, 363 U.S. 144, 158-160. There is no contrary contention. The members of the families of persons so convicted, the Legislature might well have felt, could be swayed in the performance of their duties on a crime commission by considerations of sympathy or of family loyalty. Their exclusion from this temporary unpaid body was a reasonable means of achieving a legitimate State aim. See opinion of Mr. Justice Brennan in *De Veau* v. *Braisted*, *supra*, 161. See also *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 78, *S. C.* (appeal dismissed sub dom. *Ashley* v. *Wait*) 250 U.S. 652; *Faxon* v. *School Comm. of Boston*, 331 Mass. 531, 535-538.

(b) For similar reasons another contention of the plaintiff fails. The resolve is not invalid as establishing inequality of opportunity to hold public office or employment in violation of art. 1 of the Declaration of Rights and does not deny the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States. There are other and fatal objections to the plaintiff's other argument under the Declaration of Rights. Article 9 expressly applies only to elected officials. *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 78. Article 6 concerns hereditary titles and offices. Article 7 is so clearly inapposite as to need no discussion.

5. The sixth paragraph of Res. 1962, c. 146, reads, "Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such

evidence which has come to the attention of the commission as in the opinion of the commission warrants such presentation or submission."

(a) The plaintiff argues that this provision authorizes the commission by its counsel to go before the grand jury in person, and that this would be in violation of art. 12 of the Declaration of Rights. The record in this suit does not show that its counsel has done so or that there has been any such order of the commission. Until a case presenting this issue comes before us we shall not undertake to evaluate in its context the precise meaning of the word "present." Should we at that time be of opinion that such an appearance is apparently authorized, and should we also be of opinion that such authorization would be contrary to some constitutional provision, it would then become our duty, if possible, so to construe the resolve as to avoid reasonable constitutional doubts. *Opinion of the Justices*, 330 Mass. 713, 726. *Commonwealth* v. *Benoit*, — Mass. —, —,[2] and cases cited. *United States* v. *Rumely*, 345 U.S. 41, 45-47.

(b) The plaintiff also makes the contention that this provision violates art. 30 of the Declaration of Rights, relating to the separation of powers, and the due process clause of the Fourteenth Amendment of the Constitution of the United States because it gives a legislative investigatory commission power to prosecute individuals for crime.

As we have observed earlier in the opinion, point 2, *supra*, the Legislature is empowered to conduct hearings in aid of legislation, and to conduct them itself or in some other reasonable way, of which the commission is an example. See *McGrain* v. *Daugherty*, 273 U.S. 135, 177-178; *Quinn* v. *United States*, 349 U.S. 155, 160-161; *Hutcheson* v. *United States*, 369 U.S. 599, 616. But that power is "sub-

[2] Mass. Adv. Sh. (1964)

ject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. . . . Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn* v. *United States, supra,* 161. "[T]here is no congressional power to expose for the sake of exposure." *Watkins* v. *United States,* 354 U.S. 178, 200. Unlike interference with the constitutional right of free speech (see *Sweezy* v. *New Hampshire,* 354 U.S. 234; *Watkins* v. *United States, supra,* 196-197; *Gibson* v. *Florida Legislative Investigation Commn.* 372 U.S. 539, 544), no one has constitutional protection in engaging in organized crime or in corrupt practices in government.

The plaintiff lays great store by *United States* v. *Icardi,* 140 F. Supp. 383 (D. D. C.) That case, which arose out of the questioning of a witness by a subcommittee of Congress, is quite distinguishable from one at bar. There the subcommittee had been created for the expressed purpose of investigating a single crime (a murder in the armed forces in Italy during the Second World War). The United States District Court judge found in substance that there was no valid legislative purpose, where the subcommittee already knew all the facts behind the questioning.

In the case at bar the resolve on its face serves a legitimate legislative purpose. This purpose is not nullified because some individuals are shown to have committed crimes. *McGrain* v. *Daugherty, supra,* 179-180. *Hutcheson* v. *United States, supra,* 613. *Nelson* v. *Wyman,* 99 N.H. 33, 38. In *Matter of Di Brizzi,* 303 N.Y. 206, 216-217. In the hearing stage at least no witness before the commission could claim to be punished by publicity, as the resolve prescribes that all hearings before it shall be private.[3]

[3] The fifth clause of the resolve contains such a requirement: "Witnesses shall testify only at private hearings and the same provisions with reference to secrecy which govern proceedings of a grand jury shall govern all proceedings of the commission."

So far as concerns the Fourteenth Amendment, the Supreme Court of the United States "has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255. *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84. *Carfer* v. *Caldwell*, 200 U.S. 293, 297. That question, however, is clearly open under art. 30 of the Declaration of Rights.

The courts of other States, unanimously so far as we have been able to learn, have held that the doctrine of the separation of powers is not violated. In *Nelson* v. *Wyman*, 99 N. H. 33, 38, it was said, "When the investigation provided for is a general one, the discovery of a specific, individual violation of law is collateral and subordinate to the main object of the inquiry. . . . The existence of such a possibility does not change the investigation from a legislative to a criminal one." *In Matter of Di Brizzi*, 303 N.Y. 206, 216, it was said, "The fact that the Attorney-General and the members of the Crime Commission, in determining whether there exists a relationship between organized crime and units of government, may find it necessary to inquire as to whether individual crimes have been committed does not, as petitioner urges, render the investigation unconstitutional as a usurpation of the traditional province of the grand jury in each county of the State. This is a *general* investigation into *organized* crime and its relation to government." See *Washington* v. *Superior Court*, 40 Wash. 2d 502.

In *Eggers* v. *Kenny*, 15 N.J. 107, it was held that an investigating committee of the Board of Commissioners of Jersey City, which was a legislative body, might conduct an inquiry in aid of its proper legislative functions, even though the subject of inquiry might also be the proper concern of the courts and grand juries in their enforce-

ment of the criminal laws. In so doing the court overruled an earlier case holding to the contrary because of its "disastrous effects" (p. 119).

6. The plaintiff asserts that Res. 1962, c. 146, is so broad as to allow the commission, which is not composed of legislators, to inquire into corrupt practices in connection with the election of members to the General Court and, to the extent that it does, is in violation of the Constitution, Part II, c. 1, § 2, art. 4, and Part II, c. 1, § 3, art. 10. He relies upon *Dinan* v. *Swig*, 223 Mass. 516, which concerned the courts. The commission is not a court. *Commonwealth* v. *Benoit*, — Mass. —, —.[4] We do not interpret the resolve as conferring power to adjudge corruption in the election of members to the General Court. It must be construed, as is possible, so as to avoid reasonable constitutional doubts. *Commonwealth* v. *Benoit*, *supra*, ——.[5] The commission, of course, is not engaged in inquiring into corrupt practices in the election of members of the General Court. See *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 81.

7. Violation of art. 12 of the Declaration of Rights and of the Fourteenth Amendment of the Constitution of the United States is charged by the plaintiff because, it is said, the resolve creates a crime which lacks certainty and definiteness. For this the reason assigned is that the resolve extends the circumstances in which a criminal offence can be found to have been committed, the offense being contempt for failure to answer a summons or failure to testify. Assailed are the stated purposes of the resolve, namely, "the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels."

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[4] Mass. Adv. Sh. (1964) —, —.

[5] Mass. Adv. Sh. (1964) *supra*, —.

(a) At the outset, we shall put at rest the contention that the resolve creates a new criminal offence. It does not. Failures to respond to a summons or to testify, in and of themselves, are not offences which, without more, make a witness subject to the penalties provided by G. L. (Ter. Ed.) c. 233, §§ 10, 5. Such failures merely make him subject to a court order compelling attendance and the giving of testimony. *Commonwealth* v. *Benoit*, — Mass. —, —.[6]

(b) The plaintiff was not summoned to testify as to "organized crime," although these words are well enough understood to be in the title of numerous articles in legal periodicals.[7] In *Matter of Di Brizzi*, 303 N.Y. 206, there was a Governor's executive order naming members of "the New York State Crime Commisison to investigate and take

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[6] Mass. Adv. Sh. (1964) —, —.

[7] Hodson, Organized Crime, American Crim. L. Q., Vol. 2, No. 1, p. 5 (published by Section of Criminal Law, American Bar Association, and School of Law, University of Kansas). Lumbard, Local and State Action against Organized Crime, Annals of the American Academy of Political and Social Science, May, 1963, p. 82; Miller, A Federal Viewpoint on Combating Organized Crime, *id.* at 93; Ploscow, New Approaches to the Control of Organized Crime, *id.* at 74; Sellin, Organized Crime: A Business Enterprise, *id.* at 12; Woetzel, An Overview of Organized Crime: Mores versus Morality, *id.* at 1; Strong, New England: The Refined Yankee in Organized Crime, *id.* at 40; Tyler, An Interdisciplinary Attack on Organized Crime, *id.* at 100. Patterson, Organized Crime, 18 Texas Bar J., p. 489. Pollner, Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering, 28 Brooklyn L. Rev. 37. Johnson, Organized Crime: Challenge to the American Legal System, 53 J. Crim. L., Criminology and Police Science, 399, 54 J. Crim. L., Criminology and Police Science, 1. Keating, Organized Crime—What Can Congress Do About It? 51 J. Crim. L., Criminology and Police Science, 458. Tyler, The Roots of Organized Crime, 8 Crime and Delinquency, 325. Organized Crime and Illicit Traffic in Narcotics, Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 88th Cong., 1st Sess. (1963).

action concerning the relationship between organized crime and Government" (p. 211). The court was able to discuss the subject without expressing doubt as to the meaning of the words "organized crime" (pp. 214, 215, 216, 217).

The purpose for which the plaintiff was summoned was to give testimony as to "corrupt practices in government." This is an adequately understandable area for legislative investigation and remedial action. While succinct, the words are sufficiently definite to make clear to a witness, if he knows right from wrong, the purpose of the inquiry and to enable proper interrogation of witnesses. Surely, the words are not so vague and uncertain as to permit us to rule that no proper questions material to the subject by any possibility could be framed at a hearing. Equally surely, the words constitute no valid reason for a person, immediately upon service of a summons, to attack the substance of the resolve before he has appeared and has been interrogated at all. When a witness appears at a hearing, he will have a suitable opportunity to challenge the propriety of any question. Should any issue reach the courts, the witness would have the benefit of the principle that "scrupulous care to respect the rights of a witness is mandatory. Any real doubt should be resolved in his favor." *Corcoran* v. *Commonwealth*, 335 Mass. 29, 38.

The summons served upon the plaintiff, although not so limited, in particular sought evidence as to accounts in a specified bank of a State constitutional officer, of a State department, and of a public transportation authority. The import of this part of the summons, at least, could not reasonably be mistaken.

8. We have endeavored to cover all the points raised by the plaintiff even those which, like the prayer for declaratory relief, are in the nature of cryptic suggestions.

The decree of preliminary injunction is to be vacated. A declaratory decree is to be entered in accordance with this opinion.

So ordered.

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT IN EQUITY

SUFFOLK, SS.

No. 81624

EDMUND C. SHERIDAN, *Petitioner*

v.

ALFRED GARDNER, ET AL, *Respondents*

Final Decree After Rescript

This cause came on to be further heard, after rescript from the Supreme Judicial Court for the Commonwealth, and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED and DECREED:

1. That the preliminary injunction against the respondents is herewith vacated.

2. The provisions of Res. 1962, c. 146 authorizing the governor to appoint the members of the Commission established by said Resolve do not violate Article 30 of the Declaration of Rights; nor does the appointment of persons who are not members of the legislature violate such article.

3. The power to summon vested in the Commission established by Res. 1962, c. 146 and the power given to the courts to enforce compliance with the Commission's summonses are valid delegations of legislative authority and do not violate Article 30 of the Declaration of Rights.

4. The restrictions imposed by Res. 1962, c. 146 upon the qualifications of members of the Commission thereby established are reasonable and do not constitute either a bill of attainder or an ex post facto law in violation of Article 24 or Article 25 of the Declaration of Rights, or Article 1, § 10 of the Constitution of the United States.

5. The resolve is not invalid as establishing inequality of opportunity to hold public office or employment in viola-

tion of Article 1 of the Declaration of Rights and does not deny the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States. Neither does the resolve violate Articles 6, 7 and 9 of the Declaration of Rights.

6. The Commission established by Res. 1962, c. 146 is a reasonable and valid delegation of the legislature's power to conduct investigations and hearings in aid of legislation. There is no violation of Article 30 of the Declaration of Rights relating to separation of powers or of the due process clause of the Fourteenth Amendment of the Constitution of the United States by virtue of the fact that the work of the Commission may result in a showing that some individuals have committed crimes.

7. The provisions of Res. 1962, c. 146, do not confer upon the Commission power to adjudge corruption or corrupt practices in the election of members of the General Court and the Commission has not engaged in such inquiries.

8. The provisions of Res. 1962, c. 146 do not create any new criminal offense. Failures to respond to a summons or to testify, in and of themselves, are not offences which, without more, make a witness subject to the penalties provided by G.L. (Ter. Ed.) c. 233, § 10, 5.

9. The purpose of the investigation authorized by Res. 1962, c. 146 and expressed in the words "corrupt practices in government" is sufficiently clear, definite and certain to satisfy the requirements of Article 12 of the Declaration of Rights and the Fourteenth Amendment of the Constitution of the United States. A witness has no reason to attack the Resolve because of the inclusion of said words prior to the time he has appeared and been interrogated. A witness does have a suitable opportunity at a hearing of the Commission to challenge the propriety of any question. If any issue should reach the courts, scrupulous care must be taken to respect the rights of a witness.

10. That on September 13, 1963, a summons was served upon the petitioner purporting to require his appearance before the Commission to give certain testimony. The date for the petitioner's appearance was extended by agreement to October 10, 1963. The summons stated that the petitioner was to appear on said date "and from day to day thereafter until the investigation hereinafter identified is heard by said Commission. . . ." A temporary restraining order was issued by this court on October 9, 1963 and continued in force as a preliminary injunction on October 11, 1963, enjoining the respondents from requiring the attendance or testimony of the petitioner before the Commission. To date the petitioner has not appeared or testified before the Commission. Counsel for the respondents has moved for the dismissal of this action on the grounds that it has become moot. In support of this motion to dismiss, counsel for the respondents has represented to this court that the respondents do not now intend to cause any summons to be issued to the petitioner requiring his appearance or testimony before the respondents on any matter presently under investigation. Counsel for the petitioner has represented that this action is not moot. No evidence was presented to the court on the issue of mootness and no findings have been made on that question.

By the Court, (FELIX FORTE, J.)

Entered: September 16, 1964

COPY

ATTEST:—

THOMAS F. STANTON
Asst. Clerk.

APPENDIX B

Massachusetts Resolves. 1962. Chapter 148

RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO CRIME AND CORRUPTION

Resolved, That an unpaid special commission to consist of seven members, appointed by the governor is hereby established to investigate and study as a basis for legislative action the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels, the existence of conditions which tend or may tend to prevent or interfere with the proper enforcement of the laws relating thereto, the existence of physical, legal and policy limitations on the powers and functions of those charged with the duty of enforcement of said laws and the extent to which the power of the government of the commonwealth in relation to the enforcement of said laws may or should be properly exercised at state and local levels.

No member shall hold any public office except that of justice of the peace or notary public or be a member or employee of any political committee. Not more than four of said members shall at any one time be members of the same political party. No person who has been convicted of a felony, gaming offense or any misdemeanor involving moral turpitude, nor any member of the immediate family of any such person, and no person who has served as a member of the special commission established under chapter one hundred of the resolves of nineteen hundred and fifty-three and revised and continued under chapter one hundred and forty seven of the resolves of nineteen hundred and fifty-five shall be eligible for appointment to the commission. The governor shall fill any vacancy in the commission but a vacancy shall not affect its powers and duties. The governor shall from time to time designate one of the members as chairman.

The commission shall request the commissioner of public safety to assist it in its investigation and study and he shall furnish any information in his possession which is so requested and he shall assign such assistants and investigators to said commission as it may request. The commission may require the co-operation of all agencies of state and local governments.

The commission may require by summons the attendance and testimony under oath of witnesses and the production before it of books and papers relating to any matter being investigated by it pursuant to the provisions of this resolve. Such a summons may be issued by the commission only upon a vote of the commission and shall be served in the same manner as summonses for witnesses in criminal cases issued on behalf of the commonwealth and all provisions of law relative to summonses issued in such cases shall apply to summonses issued under this resolve so far as applicable. Any justice of the supreme judicial court or of the superior court may upon application by the commission compel the attendance of witnesses summoned as aforesaid and the giving of testimony under oath before the Commission in furtherance of any investigation under this resolve in the same manner and to the same extent as before said courts.

The commission shall establish rules of procedure governing the conduct of its hearings which shall be made available in printed form to each witness prior to his testimony. Witnesses shall have the right to be represented by counsel and shall before testifying be sworn. Witnesses shall testify only at private hearings and the same provisions with reference to secrecy which govern proceedings of a grand jury shall govern all proceedings of the Commission.

Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such evidence which has come to the attention of the com-

mission as in the opinion of the commission warrants such presentation or submission.

The commission shall report to the general court annually on or before the first Wednesday in December in each year the results of its investigations and study and its recommendations, if any, together with drafts of legislation necessary to carry such recommendations into effect by filing the same with the clerk of the senate and shall file a final report not later than the last Wednesday in June, nineteen hundred and sixty-five. The commission shall also file a copy of each such report with the governor.

Approved July 27, 1962.

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Supreme Court of the United States.

October Term, 1964.

No. 612.

EDMUND C. SHERIDAN, *Appellant*,

v.

ALFRED GARDNER ET AL., *Appellees*.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

MOTION TO DISMISS BY APPELLEE EDWARD W. BROOKE, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

Now comes the Attorney General of the Commonwealth of Massachuse ts and moves that this appeal be dismissed on the ground that said appeal does not present a substantial federal question.

Statement of the Case.

The respondents are duly appointed members of the Commission created by chapter 146 of the Resolves of 1962 of the Commonwealth of Massachusetts (hereinafter called the Resolve) and attorneys retained by them to carry out the purposes set forth in the Resolve. Pursuant to authority granted in the Resolve, the respondents issued a summons to the petitioner to appear on September 16,

1963, and give testimony before the Commission and to bring with him certain records.

The date of the appearance was continued until October 10, 1963, by agreement.

On October 9, 1963, the petitioner filed a petition for a declaratory judgment as to the validity of the summons and for a temporary restraining order enjoining the respondents from requiring the attendance of the petitioner at any hearing or meetings. A temporary restraining order issued, and the case was reported to the Supreme Judicial Court of Massachusetts by the Superior Court.

On February 6, 1964, the Supreme Judicial Court filed an opinion (pp. 1a-13a of Jurisdictional Statement) directing the Superior Court to vacate the preliminary injunction and to enter a declaratory judgment in accordance with the opinion. The final decree of the Superior Court appears at pp. 14a-16a of the Jurisdictional Statement.

Questions Presented.

1. Is the due process clause of the Fourteenth Amendment violated by compelling a person to testify before a state legislative commission which is authorized to turn over evidence it receives to a grand jury, and which, in an interim report, has observed that its proposed remedial legislation will be more likely to be favorably received if preceded by convictions?

2. Does the exclusion from membership on a legislative commission, established to investigate organized crime and corrupt practices in government, of persons convicted of felonies and misdemeanors involving moral turpitude, and members of their immediate families, together with holders of public office and members of political committees, constitute a bill of attainder?

3. Is a subpoena which directs a person summoned before a duly constituted legislative committee to testify concerning "the existence and extent of corrupt practices in government at state and local levels with particular reference to the deposit of funds of [three named state agencies] with [a named banking institution]" void for excessive vagueness under the due process clause of the Fourteenth Amendment?

Reasons for Granting the Motion to Dismiss.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. The Authorization to Present Evidence to Grand Jury is Not Improper.

The appellant contends that the due process clause of the Fourteenth Amendment is violated by (*a*) the authorization of the Commission to "present" evidence to a grand jury, and (*b*) the statement in the Commission's interim report referring to potential convictions.

The appellant maintains that he would be deprived of due process if he were compelled to appear before a state legislative commission which is authorized to "present" evidence to a grand jury, and which, in one of its interim reports, observed that its ultimate recommendations for remedial legislation would carry more weight if they were preceded by convictions.

The Resolve establishing the Massachusetts Crime Commission (chapter 146 of the Resolves of 1962) provides, in part, as follows:

> "Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law en-

> forcement agency, such evidence which has come to the attention of the commission as in the opinion of the commission warrants such presentation or submission."

In the instant case no "presentation" of evidence to any grand jury ever took place. The appellant was simply summoned to testify before the Commission, and any prediction as to the ultimate referral of such testimony to a grand jury must be purely speculative. That such conjecture at this stage of the proceedings is entirely premature is reflected in the opinion of the Massachusetts Supreme Judicial Court, wherein the following dictum is to be found:

> "(a) The plaintiff argues that this provision authorizes the commission by its counsel to go before the grand jury in person, and that this would be in violation of art. 12 of the Declaration of Rights. The record in this suit does not show that its counsel has done so or that there has been any such order of the commission. Until a case presenting this issue comes before us we shall not undertake to evaluate in its context the precise meaning of the word 'present.' Should we at that time be of opinion that such an appearance is apparently authorized, and should we also be of opinion that such authorization would be contrary to some constitutional provision, it would then become our duty, if possible, so to construe the resolve as to avoid reasonable constitutional doubts. *Opinion of the Justices,* 330 Mass. 713, 726. *Commonwealth* v. *Benoit* [1964 Mass. Adv. Sh. 221, 225], and cases cited. *United States* v. *Rumely,* 345 U. S. 41, 45-47."
>
> *Sheridan* v. *Gardner,* 1964 Mass. Adv. Sh. 229, 236.

This court has often said that a state court's views upon the construction of state statutes are completely non-reviewable by the Supreme Court, and that, where the validity of a state statute has been sustained in the face of federal objections, the Supreme Court on appeal must accept the state court's construction of the statute. *Guaranty Trust Co.* v. *Blodgett*, 287 U.S. 509, 513. *Kingsley International Pictures Corp.* v. *Regents of the University of New York*, 360 U.S. 684, 688. In the instant case the state court has expressly declined to construe the statute to mean that the Commission may itself, by its counsel, go before the grand jury—which construction is now urged by the appellant. But, even if the Massachusetts court had undertaken to construe the language of the Resolve as does the appellant, no substantial federal question would be presented. Under federal law, as well as under the law of most states, a grand jury is permitted to hear evidence from any source. *Frisbie* v. *United States*, 157 U.S. 160, 163. *United States* v. *Smyth*, 104 F. Supp. 283, 295, 297. *Cawley* v. *Warren*, 216 F. 2d 74, 76.

In taking an appeal under Title 28, Section 1257(2), as distinguished from seeking certiorari under Section 1257(3), only the question of the validity of a particular state statute under federal law can be raised. Where, as here, the appellant argues that, because of some extrinsic circumstance, his federal rights prevent application of the state statute to him, an adverse decision amounts to a denial of his assertion of federal rights, rather than a validation of the state statute, and review can be had in the Supreme Court only by way of certiorari. *Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256, 259. Accordingly, insofar as the appellant seeks to have this court review his claim that the Commission's interim report referring to possible prosecutions renders his compelled appearance before the

Commission violative of due process, he has chosen the wrong remedy.

But, even under certiorari, the appellant would lack standing to obtain review on this issue. Title 28, Section 1257, authorizes review only of "final judgments or decrees." This court has construed that language as requiring that the record show ". . . that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264, 268. In the court below the question of whether the appellant's federal rights would be violated by virtue of some subsequent presentation of his testimony to a grand jury was expressly left open for future determination, should the situation ever arise.

B. The Resolve does Not Constitute a Bill of Attainder.

The appellant contends that the Resolve constitutes a bill of attainder by virtue of the fact that persons and members of the immediate families of persons who have been convicted of felonies, gaming offenses and misdemeanors involving moral turpitude, together with public officers and members of political committees, are excluded from membership on the Committee.

The appellant does not allege that he is himself within the category of excluded persons, in the absence of which allegation he has no standing to complain. *Barrows* v. *Jackson*, 346 U.S. 249. This court has often said that one cannot challenge the constitutionality of a statute unless he can show that he is within the class whose constitutional rights are allegedly infringed, even though he will suffer a direct and substantial injury from the application of the statute. See cases collected in *Barrows* v. *Jackson*, 346 U.S. 249, 256. The principle that one may not claim stand-

ing to vindicate the constitutional rights of third persons is both a matter of jurisdiction, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 149-154 (concurring opinion), and a firmly established self-imposed guideline adopted by this court to avoid hypothetical advisory opinions. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-348.

But, over and above the matter of standing, the appellant's position on this point is fatally defective on its merits. The two indispensable prerequisites to a bill of attainder are (*a*) a declaration of guilt of either the individual or the class to which he belongs, and (*b*) the imposition of punishment, in the sense appropriate for bills of attainder. *United States* v. *Lovett*, 328 U.S. 303, 324. Neither of these essential elements is to be found in the Resolve.

The Massachusetts legislature has omitted from the Resolve ". . . any condemnation for which the presumed punishment was a sanction. Thereby it negatived the essential notion of a bill of attainder." *Lovett, supra*, at p. 326. In this respect the Resolve is clearly distinguishable from the case of *Cummings* v. *Missouri*, 4 Wall. 277, relied upon by the petitioner, wherein refusal to take a specified oath was by statute deemed to be an admission of guilt.

Similarly, the element of punishment is manifestly lacking, in the absence of any provision for fine, imprisonment or deprivation of a vested right. *City of Detroit* v. *Division 26 of Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America*, 332 Mich. 237, 51 N.W. 2d 228, appeal dismissed 344 U.S. 805, 73 S. Ct. 37. There is no "vested right" to be employed in governmental service. *Ibid.*, 332 Mich. 237, 51 N.W. 2d 228, 232. See also dictum of Holmes, J., in *McAuliffe* v. *Mayor & Board of Aldermen of New Bedford*, 155 Mass. 216, at 220. ("The petitioner may have a constitutional right to

talk politics, but he has no constitutional right to be a policeman").

In the case of *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, cited by the appellant, this court held that an act requiring public servants to take a loyalty oath was not a bill of attainder, because it imposed no punishment.

> "We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment." (P. 722.)

The court went on to observe that the constitutional guaranties against bills of attainder "were not intended to preclude legislative definition of standards of qualification for public or professional employment" (341 U.S. at 722).

In the instant case it is apparent from looking at the categories of excluded persons that the principal, if not the sole, legislative concern was to establish and maintain the integrity and objectivity of the Commission. This court has held that where, as here, the focus of concern is the activity or status from which the individual is barred, as distinguished from the person or class of persons disqualified, the disqualification is not "punishment." *Flemming* v. *Nestor*, 363 U.S. 603; rehearing denied, 364 U.S. 854.

C. The Resolve is Not Unduly Vague.

The appellant contends that the terms "organized crime" and "corrupt practices," used to define the scope of the Commission's investigation, are too vague under the due process clause of the Fourteenth Amendment.

Under the terms of the Resolve, the Commission was authorized to investigate and study as a basis for legislation "the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels . . ." In the instant situation the appellant was subpoenaed to give evidence and produce documents "relating to the existence and extent of corrupt practices in government at state and local levels in the Commonwealth," with particular reference to "the deposit of funds of [three named state agencies] with [a named banking institution]." The appellant was not called upon to testify concerning "organized crime."

There can be no disputing the right of a legislative body to conduct an investigation in aid of the legislative function. *Kilbourn* v. *Thompson*, 103 U.S. 168, 189. This court has determined that an inquiry into governmental departments "to expose *corruption*, inefficiency or waste" (emphasis added) is a proper subject for such legislative investigation, *Watkins* v. *United States*, 354 U.S. 178, 187, and that, when the inquiry is directed at the operations of a government agency, or the work of a government official, its scope cannot be restricted. *McGrain* v. *Daugherty*, 273 U.S. 135. The scope of the power of inquiry is as far-reaching as the potential power to enact and appropriate under the Constitution. *Barenblatt* v. *United States*, 360 U.S. 109, 111. That scope, in the instant case, has not been exceeded by either the language of the Resolve or the narrower terminology defining the area within which the appellant was called upon to testify.

In any event, the appellant's attack is surely premature. He has not yet appeared at a hearing. He has not yet been asked a single question. At such time as he does appear, he will have an opportunity to challenge the propriety of any question which he may be asked.

Conclusion.

On the basis of the foregoing it is submitted that no substantial question of law is presented by this appeal, and that the appeal should be dismissed.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General of the
Commonwealth of Massachusetts.

WARREN K. KAPLAN,
Special Assistant Attorney General.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 612.

EDMUND C. SHERIDAN, *Appellant*,

v.

ALFRED GARDNER ET AL., *Appellees*.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

APPELLEES' MOTION TO DISMISS.

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Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 612.

EDMUND C. SHERIDAN, *Appellant*,

v.

ALFRED GARDNER ET AL., *Appellees*.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

APPELLEES' MOTION TO DISMISS.

The appellees move to dismiss on the ground that the questions presented by the appeal are so insubstantial as to require no further argument, and that the judgment of the state court here appealed rests on an adequate non-federal basis.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

Opinion Below.

The decree of the Massachusetts Superior Court is unreported and appears in Appendix A hereto. The opinion of the Supreme Judicial Court of Massachusetts is reported in 1964 Adv. Sh. 229. A copy of this opinion is attached hereto in Appendix B.

Questions Presented.

The following questions are presented by this motion to dismiss:

1. Are any rights guaranteed to an individual under the due process clause of the Fourteenth Amendment violated if that individual is summoned to appear before a state legislative commission which is authorized to submit evidence obtained from its investigations to the Attorney General, a District Attorney or other law enforcement agency?

2. Does the resolve of a state legislature creating an investigative commission constitute a bill of attainder simply because said resolve excludes from membership on that commission members of the immediate family of a person who has been convicted of certain designated crimes; and does a person not within the class excluded from such membership have standing to attack the resolve on this ground?

3. Are the rights of an individual under the due process clause of the Fourteenth Amendment violated by a mandate directing a state legislative commission to investigate ". . . the existence and extent of . . . corrupt practices in government at state and local levels . . ."?

Statutes Involved.

The provisions of Massachusetts General Laws, chapter 211, section 3; chapter 213, section 1A; and chapter 249, sections 12 and 13 are set forth in Appendix C attached hereto.

Chapter 146 of the Massachusetts Resolves of 1962 is set forth in Appendix D attached hereto.

Argument.

The questions presented by this appeal are not substantial, because the record fails to disclose any conduct or action by the appellees which has affected or may affect the rights of the appellant in a manner violative of constitutional standards. Moreover, as to certain of the questions presented the judgment of the Massachusetts Supreme Judicial Court rests on adequate non-federal grounds.

1. The appellant has urged that substantial issues of due process are raised by the alleged mingling of investigative and prosecuting powers in the legislative commission of which the appellees are members and employees. His argument on this question is phrased with a deliberate obscurity which provides a plausible veneer. A clear analysis of this argument reveals (*i*) that the powers of this commission do not present any substantial federal questions under the due process clause of the Fourteenth Amendment; and (*ii*) that an adequate non-federal basis exists for the decision which is here appealed.

The due process clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The appellant apparently fears and claims a deprivation of his "liberty." Such deprivation could only occur if the alleged combination of functions of the commission is *per se* invalid, or if some particular constitutionally protected right of the appellant is infringed by the very existence of a state commission having such an alleged combination of functions.

The examination of these alternatives must begin with some understanding of what is actually involved in the alleged combination of investigative and prosecuting functions of the commission. The investigative mandate contained in the resolve creating the commission is explicit

and provides that said commission has been established. (Appendix D, p. 36)—

> ". . . to investigate and study as a basis for legislative action the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels, the existence of conditions which tend or may tend to prevent or interfere with the proper enforcement of the laws relating thereto, the existence of physical, legal and policy limitations on the powers and functions of those charged with the duty of enforcement of said laws and the extent to which the power of the government of the commonwealth in relation to the enforcement of said laws may or should be properly exercised at state and local levels."

Except for the alleged vagueness of the phrase "corrupt practices," which will be discussed later, no question is presented by the appeal concerning this investigative mandate.

The question of the prosecuting function of the commission arises by virtue of the following language from the resolve (Appendix D, pp. 36, 38):

> "Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such evidence which has come to the attention of the commission as in the opinion of the commission warrants such presentation or submission."

An examination of the Second Report and the Third Report of the commission (included as a part of the record of this appeal) clearly discloses that evidence developed by

the investigations of the commission has been presented to the grand jury, *but not by the commission or its counsel.* Thus the Third Report notes:

> "The Commission is conducting an intensive program of investigations to obtain evidence identifying the persons involved and disclosing the details of their corrupt practices. *As such evidence is obtained it is submitted to the Attorney General or such other law enforcement agency as may be appropriate.*" (Emphasis supplied.)

The Supreme Judicial Court considered appellant's argument relating to presentation of evidence to a grand jury by counsel for the commission and observed (Appendix B, pp. 20, 27-28):

> "The record in this suit does not show that its counsel has done so or that there has been any such order of the commission. Until a case presenting this issue comes before us we shall not undertake to evaluate in its context the precise meaning of the word 'present.' Should we at that time be of opinion that such an appearance is apparently authorized, and should we also be of opinion that such authorization would be contrary to some constitutional provision, it would then become our duty, if possible, so to construe the resolve as to avoid reasonable constitutional doubts. *Opinion of the Justices,* 330 Mass. 713, 726. *Commonwealth* v. *Benoit* [1964 Adv. Sh. 221, 225], and cases cited. *United States* v. *Rumely,* 345 U.S. 41, 45-47."

a. Appellant admits, as he must, that he does not request this court to enforce either federal or state notions of separation of powers in his attack on the alleged combination of investigative and prosecuting functions in the

commission. No particular concept of separation of powers is required of the states by the United States Constitution and in particular the due process clause of the Fourteenth Amendment. *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255. *Carfer* v. *Caldwell*, 200 U.S. 293, 297. *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84. This is a matter within the discretion of the state; and no substantial federal question is raised by an attack on any particular arrangement of functions as *per se* invalid.

On the question of presentation of evidence to a grand jury by counsel for the commission, as noted earlier the Supreme Judicial Court has ruled that this issue was not properly before the court for decision on the facts contained in the record of this case. A state court judgment that a question is prematurely presented furnishes an adequate non-federal ground for decision and permits a dismissal of the appeal by this court on that point. *Petrie* v. *Nampa & Meridian Irrigation District*, 248 U.S. 154.

The Supreme Judicial Court nonetheless considered fully the appellant's contention that the commission's alleged power to prosecute individuals for crime violated the due process clause of the Fourteenth Amendment. This same contention is urged at page 7 and thereafter of appellant's jurisdictional statement under the rubric "inquisitorial techniques in public prosecution."

Unfortunately the decisions relied upon by the appellant simply do not support his contention. *United States* v. *Icardi*, 140 F. Supp. 383 (U.S.D.C. D.C.), involved a federal legislative subcommittee subject to separation of powers limitations which are not applicable here. In that case the subcommittee was created for the express purpose of investigating a single crime. No valid legislative purpose was served by the interrogation of Icardi because the subcommittee was already fully informed of the facts. In contrast, the present commission was created to investigate

and recommend legislation in an important area of state governmental concern and action. The propriety of the area, purpose and means of this investigation has been reviewed and approved by the highest court of the state (Appendix B).

In *Quinn* v. *United States*, 349 U.S. 155, relied upon by appellant and considered by the Supreme Judicial Court, this court again dealt with a federal congressional committee operating within the constitutionally protected areas of the First and Fifth Amendments. In *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, this court considered actions of a state legislative committee operating within the constitutionally protected area of freedom of association. The competence of any legislation in such an area, and, *a fortiori*, of legislative investigation in such an area, involves considerations which are not present or relevant to the present case.

In *Uphaus* v. *Wyman*, 360 U.S. 72, the dissenting opinion of Justice Brennan, relied upon by the appellant, stressed that the Attorney General of New Hampshire, acting as a one-man legislative committee, had invaded the appellant's constitutionally protected rights of freedom of speech and assembly in an inquiry aimed at exposure for its own sake. The factors with which Justice Brennan was there concerned are plainly absent in the present case.

In short, the decisions of this court, relied upon by the appellant, show that the combination of investigative and prosecuting functions in a state legislative committee which is here alleged is not *per se* invalid under the due process clause. The opinion of the Supreme Judicial Court considered fully this issue and dealt with every claim of the appellant which was seasonably presented. That court's refusal to pass on the issue of presentation of evidence to a grand jury because that issue was not then properly before it provides an adequate non-federal ground for its decision.

b. Since the alleged combination of functions is not, by itself, invalid, any due process violation must be founded in an infringement of a particular federally protected right of the appellant caused by this otherwise valid joinder of functions in the commission. Unfortunately, the appellant has failed to designate any particular constitutionally protected right which has been infringed. Most charitably viewed, his assertions of due process invalidity may be said to embody the specific claim that his "liberty" has been, or necessarily will be, impaired.

This court has consistently held that the constitution does not afford to every person absolute freedom from restraint. In *Jacobson* v. *Massachusetts,* 197 U.S. 11, at page 26, the court noted:

> "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community."

Certainly the Massachusetts legislature was manifestly and properly concerned with the "good order and morals of the community" when it created the commission.

The issue is not the protection of the "liberty" of the appellant as a general matter. The question is whether the prospective restraints on his liberty, if he is required to app ar before the commission, are unconstitutional under the decisions of this court. Appellant has produced no authority to support his view and the appellees have found none. Indeed, the cases cited, and many others, show clearly that a state legislature has broad powers to investigate an area in which it may constitutionally legislate with the benefit of the information thereby obtained. It is equally plain that a legislature may determine to authorize

compelled testimony to assist in such an investigation. *Watkins* v. *United States*, 354 U.S. 178, 187, 200-201.

Neither the investigation itself nor the enforcement of process in connection therewith constitutes an unreasonable restraint upon the liberty of individuals who may be witnesses. This result obtains even in cases where particular constitutional rights, such as freedom of speech and assembly, may be limited by the investigation. *Uphaus* v. *Wyman, supra.* In both *Uphaus* v. *Wyman, supra,* and *Gibson* v. *Florida Legislative Investigation Committee, supra,* the two state cases cited by appellant to establish the importance of the due process questions in this appeal, the infringement of a specific constitutional right was claimed. Appellant here claims no violation of a particular constitutional right.

For the reasons above stated, the due process claims of this appeal should be dismissed.

2. The appellant contends that the resolve creating the commission affects a bill of attainder because it bars from membership on the commission any member of the immediate family of a person convicted of a felony, gaming offense or misdemeanor involving moral turpitude. This contention must fail at the outset because the appellant lacks standing to attack the resolve as a bill of attainder.

a. The appellant admits that he is not one of the class of persons disqualified from membership on the commission (Jurisdictional Statement, p. 9). There plainly are persons within the proscribed class who would have standing to challenge the resolve under the ordinary rules governing federal standing. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 140-141. One cannot assert the rights of third persons where they have an adequate and available method of asserting such rights under

local law or otherwise. See *Barrows* v. *Jackson*, 346 U.S. 249, 255.

Appropriate means of review are available to the persons allegedly affected by the resolve in this context under Massachusetts procedures. Thus the Attorney General may proceed by a writ of quo warranto, or an information in the nature of quo warranto, to challenge the resolve on the ground that it is a bill of attainder. *Attorney General* v. *Sullivan*, 163 Mass. 446, 447-449. *Brierley* v. *Walsh*, 299 Mass. 292, 295. Mass. G.L. c. 211, § 3. Mass. G.L. c. 213, § 1A. Mass. G.L. (Ter. Ed.) c. 249, § 12, § 13 (Appendix C, pp. 34, 35).

The assertion by appellant that, unless he is permitted to raise the bill of attainder issue, that issue could never be presented is not true. The exceptional circumstances noted by the court in *Barrows* v. *Jackson*, *supra*, do not exist in the present case.

b. The appellant argues that, because a disqualification from office *can*, in appropriate circumstances, be a punishment within the prohibition in article I, section 10, of the United States Constitution against bills of attainder, it necessarily follows that the exclusion from membership contained in the present resolve is such a punishment. The decisions of this court make clear, however, that not all disqualifications are punishments.

The purpose and effect of the legislation must first be analyzed. As the court said in *De Veau* v. *Braisted*, 363 U.S. 144, 160: "The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt." For a legislative enactment to be a bill of attainder the purpose of the legislature must be demonstrated to have been punitive. *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716. In this context "punishment" does not encompass every deprivation of some

enjoyment or opportunity, but only a deprivation for a punitive purpose. *United States* v. *Lovett*, 328 U.S. 303, 324 (Frankfurter, J., concurring). *Hawker* v. *New York*, 170 U.S. 189.

The exclusion in the present resolve of the members of the immediate family of any person convicted of certain crimes neither declares guilt nor exacts punishment. The Supreme Judicial Court opinion fully considered this issue and noted (Appendix B, pp. 20, 26):

> ". . . it is clear that the Legislature was directing its sights at the qualifications of the members with a view to enabling the creation of a commission which would impart an innate idea of independence and integrity and with the purpose to instil a public sense of security and confidence in a body to which was to be confided authority in sensitive areas.
>
> . . . . . .
>
> ". . . The members of the families of persons so convicted, the Legislature might well have felt, could be swayed in the performance of their duties on a crime commission by considerations of sympathy or of family loyalty. Their exclusion from this temporary unpaid body was a reasonable means of achieving a legitimate State aim."

The findings of the highest court of the Commonwealth of Massachusetts in construing state legislation which involved important considerations of local public attitudes are entitled to weight in this court. *Avery* v. *Alabama*, 308 U.S. 444, 447. *Nebbia* v. *New York*, 291 U.S. 502.

This court has often recognized the presumption of constitutionality to which legislative enactments are entitled and has noted its reluctance to question manifest legislative objectives and judgments except upon the clearest showing. *Flemming* v. *Nestor*, 363 U.S. 603, 617. *De Veau* v.

Braisted, supra, 158-160. *Hawker* v. *New York, supra,* 191-198.

To talk of guilt or innocence with reference to the excluded class is to use the wrong frame of reference. The purpose of this exclusion was to achieve public respect and confidence in the impartiality of the commission. Such respect and confidence were essential to secure to the commission the co-operation of the public so necessary for effective investigation and the support of the public for its report and legislative recommendations. In short, the exclusion of which appellant complains does no violence to the requirements of article I, section 10, of the United States Constitution and poses no substantial federal question for this court on the bill of attainder issue.

3. Appellant asserts that the commission has been delegated authority to investigate a subject described in the resolve merely as "corrupt practices" (Jurisdictional Statement, p. 10). Upon this assertion the appellant founds two arguments: first, that the commission's delegation is so broad that it violates constitutional limitations upon the power of a legislature to investigate; and, secondly, that the resolve has the effect of creating a new crime which is insufficiently defined to satisfy constitutional standards.

The initial difficulty with appellant's position is simply that his argument is factually inaccurate. The delegation in the resolve is not to investigate merely "corrupt practices," but rather to investigate—

> ". . . the existence and extent of . . . corrupt practices in government at state and local levels, the existence of conditions which tend or may tend to prevent or interfere with the proper enforcement of the laws relating thereto, the existence of physical, legal and policy limitations on the powers and functions of those

charged with the duty of enforcement of said laws and the extent to which the power of the government of the commonwealth in relation to the enforcement of said laws may or should be properly exercised at state and local levels." (Appendix D, p. 36.)

The Supreme Judicial Court has recognized that—

"... This is an adequately understandable area for legislative investigation and remedial action. While succinct, the words are sufficiently definite to make clear to a witness, if he knows right from wrong, the purpose of the inquiry and to enable proper interrogation of witnesses. Surely, the words are not so vague and uncertain as to permit us to rule that no proper questions material to the subject by any possibility could be framed at a hearing." (Appendix B, pp. 20, 32-33.)

It should be further noted that the summons issued to the appellant and challenged here sought not merely testimony about "the existence and extent of corrupt practices in government" but more particularly testimony and documents concerning the deposit of funds of the State Department of Public Works, the State Treasurer and the Metropolitan Transit Authority in a specified banking institution. As the Supreme Judicial Court noted, "The import of this part of the summons, at least, could not reasonably be mistaken" (Appendix B, pp. 20, 33).

a. It seems plain that the delegation to this commission is not unconstitutionally broad. The reliance of the appellant upon *Sweezy* v. *New Hampshire, supra,* is inapposite. The inquiry here authorized does not interfere with a particular federally protected right, such as freedom of speech, assembly or association. Neither does the investigation

contemplate exposure for its own sake. On the contrary, this delegation serves a valid legislative purpose. *McGrain* v. *Daugherty*, 273 U.S. 135, 177-180. Indeed, this court recognized in *Watkins* v. *United States, supra*, at page 187, the power of a legislature to conduct investigations into governmental departments "to expose *corruption*, inefficiency or waste." (Emphasis supplied.)

In short, the contentions of the appellant that the legislative delegation to the commission is unconstitutionally broad and indefinite do not present any substantial federal question.

b. The appellant's argument that the resolve established a new crime insufficiently defined to satisfy due process requirements must also fail. The Supreme Judicial Court has ruled that no new criminal offense was created by the resolve (Appendix B, pp. 20, 31). The construction of a state statute by the state's highest court is in ordinary circumstances binding on this court. *Supreme Lodge, Knights of Pythias* v. *Meyer*, 265 U.S. 30, 32-33.

Failure to appear or to testify before the commission, without more, invokes no criminal sanction. The power of the commission to compel the appearance and testimony of a witness can only be enforced by a judicial order after hearing. The only crime involved would be a contempt of court, an offense which can hardly be described as "new."

Appellant argues, however, that the resolve affords no sufficient and definite standard by which a court may judge the propriety of a particular investigation or particular questions in the context of a judicial proceeding to compel testimony. This contention must fail for the same reasons that appellant's arguments relating to an unconstitutionally broad delegation of investigative authority must fail. The standard to be applied by the court is "the existence and extent of corrupt practices in government at state and local

levels." This phrase appears both in the resolve and in the summons issued to the appellant. These words have a plain, ordinary and certain meaning as used in the common parlance of our society. The reference is to standards accepted and understood by our society, and necessarily by a witness, if he can distinguish right from wrong. As the Supreme Judicial Court noted (Appendix B, pp. 20, 33):

> ". . . Equally surely, the words constitute no valid reason for a person, immediately upon service of a summons, to attack the substance of the resolve before he has appeared and has been interrogated at all. When a witness appears at a hearing, he will have a suitable opportunity to challenge the propriety of any question. Should any issue reach the courts, the witness would have the benefit of the principle that 'scrupulous care to respect the rights of a witness is mandatory. Any real doubt should be resolved in his favor.' *Corcoran* v. *Commonwealth*, 335 Mass. 29, 38."

The resolve creates no new crime and the process of enforcement of testimony before the commission involves no violation of the due process clause. Appellee's arguments in this regard present no substantial federal question.

The appellant suggests for the first time in his jurisdictional statement that any judicial narrowing of the scope of inquiry permitted by the resolve cannot correct the purported vagueness of the resolve without thereby creating the problems of an *ex post facto* law. To this effect he cites *Bouie* v. *City of Columbia*, 378 U.S. 347. That case, however, involved a court interpretation which broadened a narrow state statute, just the reverse of the situation here hypothecated by the appellant.

The evil of the *ex post facto* law is that it declares criminal an act that was non-criminal when committed. But any

judicial narrowing of the scope of inquiry about which a witness might be interrogated—and punished if recalcitrant —has the effect of declaring non-criminal acts which might previously have been thought criminal. This is just the opposite of the harm done by an *ex post facto* law. Further, this narrowing of the scope of inquiry by judicial order would occur before any witness had been compelled to appear or testify before the commission and thus before any punishment for contempt could be imposed. This, again, is the reverse of the *ex post facto* law, which involves the articulation of the crime after the person's act has been performed.

Thus the *ex post facto* aspects of appellant's argument, if properly raised, nonetheless present no substantial federal question.

Conclusion.

The decision of the Massachusetts Supreme Judicial Court and the decree entered pursuant to that decision by the Massachusetts Superior Court do not abridge or infringe any constitutional rights of the appellant. The questions presented by this appeal are not substantial, and the motion to dismiss should be allowed.

Respectfully submitted,

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Appendix A.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court
in Equity
No. 81624

EDMUND C. SHERIDAN, Petitioner

v.

ALFRED GARDNER, ET AL., Respondents.

FINAL DECREE AFTER RESCRIPT.

This cause came on to be further heard, after rescript from the Supreme Judicial Court for the Commonwealth, and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED and DECREED:

1. That the preliminary injunction against the respondents is herewith vacated.

2. The provisions of Res. 1962, c. 146 authorizing the governor to appoint the members of the Commission established by said Resolve do not violate Article 30 of the Declaration of Rights; nor does the appointment of persons who are not members of the legislature violate such article.

3. The power to summon vested in the Commission established by Res. 1962, c. 146 and the power given to the courts to enforce compliance with the Commission's summonses are valid delegations of legislative authority and do not violate Article 30 of the Declaration of Rights.

4. The restrictions imposed by Res. 1962, c. 146 upon the qualifications of members of the Commission thereby established are reasonable and do not constitute either a bill of attainder or an ex post facto law in violation of Article 24 or Article 25 of the Declaration of Rights, or Article 1, § 10 of the Constitution of the United States.

5. The resolve is not invalid as establishing inequality of opportunity to hold public office or employment in violation of Article 1 of the Declaration of Rights and does not deny the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States. Neither does the resolve violate Articles 6, 7 and 9 of the Declaration of Rights.

6. The Commission established by Res. 1962, c. 146 is a reasonable and valid delegation of the legislature's power to conduct investigations and hearings in aid of legislation. There is no violation of Article 30 of the Declaration of Rights relating to separation of powers or of the due process clause of the Fourteenth Amendment of the Constitution of the United States by virtue of the fact that the work of the Commission may result in a showing that some individuals have committed crimes.

7. The provisions of Res. 1962, c. 146, do not confer upon the Commission power to adjudge corruption or corrupt practices in the election of members of the General Court and the Commission has not engaged in such inquiries.

8. The provisions of Res. 1962, c. 146 do not create any new criminal offense. Failures to respond to a summons or to testify, in and of themselves, are not offences which, without more, make a witness subject to the penalties provided by G.L. (Ter. Ed.) c. 233, § 10, 5.

9. The purpose of the investigation authorized by Res. 1962, c. 146 and expressed in the words "corrupt practices in government" is sufficiently clear, definite and certain to satisfy the requirements of Article 12 of the Declaration of Rights and the Fourteenth Amendment of the Constitution of the United States. A witness has no reason to attack the Resolve because of the inclusion of said words prior to the time he has appeared and been interrogated. A witness does have a suitable opportunity at a hearing of the Commission to challenge the propriety of any question.

If any issue should reach the courts, scrupulous care must be taken to respect the rights of a witness.

10. That on September 13, 1963, a summons was served upon the petitioner purporting to require his appearance before the Commission to give certain testimony. The date for the petitioner's appearance was extended by agreement to October 10, 1963. The summons stated that the petitioner was to appear on said date "and from day to day thereafter until the investigation hereinafter identified is heard by said Commission. . . ." A temporary restraining order was issued by this court on October 9, 1963 and continued in force as a preliminary injunction on October 11, 1963, enjoining the respondents from requiring the attendance or testimony of the petitioner before the Commission. To date the petitioner has not appeared or testified before the Commission. Counsel for the respondents has moved for the dismissal of this action on the grounds that it has become moot. In support of this motion to dismiss, counsel for the respondents has represented to this court that the respondents do not now intend to cause any summons to be issued to the petitioner requiring his appearance or testimony before the respondents on any matter presently under investigation. Counsel for the petitioner has represented that this action is not moot. No evidence was presented to the court on the issue of mootness and no findings have been made on that question.

By the Court, (Forte J.)

Entered: Sept. 16, 1964

Appendix B.

Advance Sheets

OPINIONS OF THE SUPREME JUDICIAL COURT

EDMUND C. SHERIDAN *vs.* ALFRED GARDNER & others.

Suffolk. January 8, 1964.—February 6, 1964.

Present: WILKINS, C.J., SPALDING, WHITTEMORE, CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

Massachusetts Crime Commission. Special Commission. Constitutional Law, Separation of powers, General Court, Bill of attainder, Ex post facto law, Public office, Equal protection of laws, Due process of law. *General Court. Witness,* Compelling giving of testimony. *Contempt. Equity Jurisdiction,* Declaratory relief, Proceeding against Commonwealth. *Statute,* Construction. *Words,* "Organized crime," "Corrupt practices in government."

Report by *Sullivan, J.*, of a suit in equity in the Superior Court.

WILKINS, C.J. This bill for declaratory relief has been reported without decision by a judge of the Superior Court upon the pleadings and a statement of agreed facts amounting to a case stated. Further proceedings have been stayed, and the defendants enjoined from taking further steps to procure the attendance of the plaintiff as a witness, as hereinafter discussed. The prayer for declaratory relief is vague. It asks a binding declaration "of the right, duty, status and other legal relations" of the parties.

Seven defendants are the members of the commission (sometimes called Massachusetts Crime Commission) appointed by the Governor pursuant to Res. 1962, c. 146, and the remaining two are their counsel. The plaintiff is a resident of Boston upon whom on September 13, 1963, service was made of a paper, in form a summons, by a sergeant of the State police. The summons was directed to the plaintiff at the Department of Public Works to appear before the commission on September 16. It required

the plaintiff "to give evidence of what you know relating to the existence and extent of corrupt practices in government at state and local levels in the Commonwealth and in particular to the following: the deposit of funds of the Department of Public Works, the State Treasurer, and the Metropolitan Transit Authority with the . . . [name of bank deleted by order of Superior Court] and you are further required to bring with you all correspondence, memoranda, records, or writings of any sort pertaining to the deposit of funds of the Department of Public Works at the" said bank. On the reverse side of the summons are printed "The Rules of Procedure Governing the Conduct of Hearings Before the Massachusetts Crime Commission."

The plaintiff has never appeared before the commission. He raises numerous questions under the State and Federal Constitutions assailing the validity of the commission and of its summons. The Attorney General has been notified in accordance with G. L. c. 231A, § 8.

1. This is a suit against individual members of a board and their counsel, and is neither in form nor in substance, against the Commonwealth. Most obviously, it is not within the holding of *Executive Air Serv. Inc.* v. *Division of Fisheries & Game*, 342 Mass. 356, where declaratory relief was sought as to land of the Commonwealth, which was a necessary party. See *Demetropolos* v. *Commonwealth*, 342 Mass. 658, 661. See also *Moneyweight Scale Co.* v. *McBride*, 199 Mass. 503, 505–506, *S. C.* (appeal dismissed) 223 U. S. 749; *Commonwealth* v. *Norman*, 249 Mass. 123, 130–131.

2. It is objected that the resolve violates art. 30 of the Declaration of Rights in that it authorizes the executive department to exercise a legislative power in appointing the members. We do not agree. The first paragraph of the resolve reads: "That an unpaid special commission to consist of seven members appointed by the governor is

hereby established to investigate and study as a basis for legislative action the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels, the existence of conditions which tend or may tend to prevent or interfere with the proper enforcement of the laws relating thereto, the existence of physical, legal and policy limitations on the powers and functions of those charged with the duty of enforcement of said laws and the extent to which the power of the government of the commonwealth in relation to the enforcement of said laws may or should be properly exercised at state and local levels."

The power to fill vacancies is in the Governor, who shall from time to time designate one of the members as chairman.

The resolve also provides: "The commission shall report to the general court annually on or before the first Wednesday in December in each year the results of its investigations and study and its recommendations, if any, together with drafts of legislation necessary to carry such recommendations into effect by filing the same with the clerk of the senate and shall file a final report not later than the last Wednesday in June, nineteen hundred and sixty-five. The commission shall also file a copy of each such report with the governor."

In *Attorney Gen.* v. *Brissenden*, 271 Mass. 172, the entrusting of a legislative investigation to a member of the executive department, namely, the Attorney General, was held not to violate art. 30. At page 181, it was said by Chief Justice Rugg, speaking for the court: "The ascertainment of pertinent facts as the basis for legislation is within the power of the law making department of government. When a legislative body has a right to do an act, it must be allowed to select the means within reasonable bounds. It is not precluded from delegating incidental

powers which it may exercise itself in aid of its primary functions but which do not partake of the nature of law making. Authority to obtain information necessary for its determination concerning the exercise of the power to enact laws may be conferred upon nonlegislative bodies. . . . Where facts are necessary as a basis for legislative action, the General Court may ascertain them in any reasonable way. Familiar methods are by appropriating the results of studies already made by itself or by others, by conducting an inquiry through a committee of its members, or by utilizing an existing commission or board to make and report the results of a research."

The product of the work of the commission would be a reasonable source of information to the Legislature, which still would have the exclusive power to decide what, if any, legislation should be enacted. There is nothing in art. 30 which requires that investigations in aid of possible legislation should be conducted in whole or in part by members of the General Court. Indeed, the right of petition guaranteed by art. 19 of the Declaration of Rights conclusively points to the contrary. See, similarly, the First Amendment of the Constitution of the United States.

It is common knowledge that legislation frequently is proposed by a Governor and by other executive officers of the State. The Acts and Resolves over the years contain hundreds of examples where the Legislature has exercised its powers to conduct investigations, obtain facts, and receive reports through commissions and specified officers and boards. In very many instances the Governor has appointed a majority of the members of a commission. In a large number there have been no legislative members. In others the commissions created, or the boards designated, by the Legislature were empowered to hold hearings and to make report to the Legislature with drafts of recommended legislation. Res. 1947, c. 53. Res. 1949, cc. 28, 34, 46, 48.

Res. 1950, cc. 46, 56. Res. 1951, c. 64. Res. 1952, cc. 71, 77. Res. 1961, c. 22. Res. 1962, cc. 86, 120. Res. 1963, c. 144.

Appointment of members of a legislative recess commission by the Governor was approved in *Opinion of the Justices*, 302 Mass. 605, 620. In *Brown* v. *Russell*, 166 Mass. 14, 25, it was said that the Legislature, barring a constitutional limitation on its power, could confer the power of appointment to offices created by it upon public officers or boaords. This statement was quoted with approval in *Bradley* v. *Board of Zoning Adjustment of Boston*, 255 Mass. 160, 165.

3. The conferring of the power to summon does not affect the validity of the Legislature's delegation of authority to the commission.[1] In *Attorney Gen.* v. *Brissenden*, 271 Mass. 172, 183–184, it was said, "There are numerous instances, in the actions of the General Court, where power has been vested in courts to compel the attendance and the giving of testimony by witnesses before boards, commissions and other bodies exercising quasi judicial powers or powers of inquiry as to facts. . . . The court is ever solicitous to maintain the sharp division between the three de-

[1] In the fourth paragraph of the resolve it is provided: "The commission may require by summons the attendance and testimony under oath of witnesses and the production before it of books and papers relating to any matter being investigated by it pursuant to the provisions of this resolve. Such a summons may be issued by the commission only upon a vote of the commission and shall be served in the same manner as summonses for witnesses in criminal cases issued on behalf of the commonwealth and all provisions of law relative to summonses issued in such cases shall apply to summonses issued under this resolve so far as applicable. Any justice of the supreme judicial court or of the superior court may upon application by the commission compel the attendance of witnesses summoned as aforesaid and the giving of testimony under oath before the commission in furtherance of any investigation under this resolve in the same manner and to the same extent as before said courts."

partments of government as declared by art. 30 of the Declaration of Rights. . . . But that bound has not been overstepped by the present resolves. We are of opinion that the question, whether the defendant may be compelled to testify before the plaintiff as to the matters disclosed on this record, is judicial in its nature. The provision of the resolves authorizing this court to compel the defendant to give testimony is a valid exercise of legislative power and confers jurisdiction to act."

There is no merit in the assertion that art. 30 of the Declaration of Rights is violated because a discretion in the courts to refuse an application enables the judiciary to prohibit the Legislature from examining particular witnesses or posing particular questions.

4. The second paragraph of Res. 1962, c. 146, contains the following: "No member shall hold any public office except that of justice of the peace or notary public or be a member or employee of any political committee. Not more than four of said members shall at any one time be members of the same political party. No person who has been convicted of a felony, gaming offense or any misdemeanor involving moral turpitude, *nor any member of the immediate family of any such person,* and no person who has served as a member of . . . [a previous crime commission] *shall be eligible for appointment to the commission*" (emphasis supplied).

(a) The plaintiff contends that the italicized words constitute a bill of attainder and an ex post facto law in violation of art. 24 or art. 25 of the Declaration of Rights and of art. 1, § 10, of the Constitution of the United States. "The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt. . . . The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts." *De Veau* v. *Braisted,* 363 U. S. 144, 160.

From the italicized words read in context, it is clear that the Legislature was directing its sights at the qualifications of the members with a view to enabling the creation of a commission which would impart an innate idea of independence and integrity and with the purpose to instil a public sense of security and confidence in a body to which was to be confided authority in sensitive areas. See *Brown* v. *Russell*, 166 Mass. 14, 17, 25–26; *Ross* v. *Crane*, 291 Mass. 28, 33. There was plainly no intent to declare guilt or to impose punishment. See *Garner* v. *Board of Pub. Works of Los Angeles*, 341 U.S. 716, 722; *Flemming* v. *Nestor*, 363 U. S. 603, 613–616.

We are equally of opinion that no guilt was declared or punishment imposed. More than one class of persons were barred. It is not contended that holders of public office, members and employees of political committees, and members of former crime commissions could not properly be excluded, nor that the number of members of a political party could not be limited. No suggestion of declaration of guilt or of punishment for crime can be made as to them. The exclusion of persons convicted of felonies, gaming offences, and misdemeanors involving moral turpitude does not establish an unreasonable qualification for membership. *Hawker* v. *New York*, 170 U. S. 189. *De Veau* v. *Braisted*, 363 U. S. 144, 158–160. There is no contrary contention. The members of the families of persons so convicted, the Legislature might well have felt, could be swayed in the performance of their duties on a crime commission by considerations of sympathy or of family loyalty. Their exclusion from this temporary unpaid body was a reasonable means of achieving a legitimate State aim. See opinion of Mr. Justice Brennan in *De Veau* v. *Braisted*, *supra*, 161. See also *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 78, *S. C.* (appeal dismissed sub nom. *Ashley* v.

Wait) 250 U.S. 652; *Faxon* v. *School Comm. of Boston*, 331 Mass. 531, 535–538.

(b) For similar reasons another contention of the plaintiff fails. The resolve is not invalid as establishing inequality of opportunity to hold public office or employment in violation of art. 1 of the Declaration of Rights and does not deny the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States. There are other and fatal objections to the plaintiff's other arguments under the Declaration of Rights. Article 9 expressly applies only to elected officials. *Ashley* v. *Three Justices of the Superior Court*, 228 Mass. 63, 78. Article 6 concerns hereditary titles and offices. Article 7 is so clearly inapposite as to need no discussion.

5. The sixth paragraph of Res. 1962, c. 146, reads, "Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such evidence which has come to the attention of the commission as in the opinion of the commission warrants such presentation or submission."

(a) The plaintiff argues that this provision authorizes the commission by its counsel to go before the grand jury in person, and that this would be in violation of art. 12 of the Declaration of Rights. The record in this suit does not show that its counsel has done so or that there has been any such order of the commission. Until a case presenting this issue comes before us we shall not undertake to evaluate in its context the precise meaning of the word "present." Should we at that time be of opinion that such an appearance is apparently authorized, and should we also be of opinion that such authorization would be contrary to some constitutional provision, it would then become our duty, if possible, so to construe the resolve as to avoid reasonable constitutional doubts. *Opinion of the Justices*, 330 Mass.

713, 726. *Commonwealth* v. *Benoit,* Mass. , ,[1] and cases cited. *United States* v. *Rumely,* 345 U. S. 41, 45–47.

(b) The plaintiff also makes the contention that this provision violates art. 30 of the Declaration of Rights, relating to the separation of powers, and the due process clause of the Fourteenth Amendment of the Constitution of the United States because it gives a legislative investigatory commission power to prosecute individuals for crime.

As we have observed earlier in the opinion, point 2, *supra,* the Legislature is empowered to conduct hearings in aid of legislation, and to conduct them itself or in some other reasonable way, of which the commission is an example. See *McGrain* v. *Daugherty,* 273 U. S. 135, 177–178; *Quinn* v. *United States,* 349 U. S. 155, 160–161; *Hutcheson* v. *United States,* 369 U. S. 599, 616. But that power is "subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. . . . Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn* v. *United States, supra.* 161. "[T]here is no congressional power to expose for the sake of exposure." *Watkins* v. *United States,* 354 U. S. 178, 200. Unlike interference with the constitutional right of free speech (see *Sweezy* v. *New Hampshire,* 354 U. S. 234; *Watkins* v. *United States, supra,* 196–197; *Gibson* v. *Florida Legislative Investigation Commn.* 372 U. S. 539, 544), no one has constitutional protection in engaging in organized crime or in corrupt practices in government.

The plaintiff lays great store by *United States* v. *Icardi,* 140 F. Supp. 383 (D. D. C.). That case, which arose out of the questioning of a witness by a subcommittee of Congress,

[1] Mass. Adv. Sh. (1964) 221, 225.

is quite distinguishable from the one at bar. There the subcommittee had been created for the expressed purpose of investigating a single crime (a murder in the armed forces in Italy during the Second World War). The United States District Court judge found in substance that there was no valid legislative purpose, where the subcommittee already knew all the facts behind the questioning.

In the case at bar the resolve on its face serves a legitimate legislative purpose. This purpose is not nullified because some individuals are shown to have committed crimes. *McGrain* v. *Daugherty, supra,* 179–180. *Hutcheson* v. *United States, supra,* 613. *Nelson* v. *Wyman,* 99 N. H. 33, 38. In *Matter of Di Brizzi,* 303 N. Y. 206, 216–217. In the hearing stage at least no witness before the commission could claim to be punished by publicity, as the resolve prescribes that all hearings before it shall be private.[1]

So far as concerns the Fourteenth Amendment, the Supreme Court of the United States "has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments." *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255. *Dreyer* v. *Illinois,* 187 U. S. 71, 83–84. *Carfer* v. *Caldwell,* 200 U. S. 293, 297. That question, however, is clearly open under art. 30 of the Declaration of Rights.

The courts of other States, unanimously so far as we have been able to learn, have held that the doctrine of the separation of powers is not violated. In *Nelson* v. *Wyman,* 99 N. H. 33, 38, it was said, "When the investigation provided for is a general one, the discovery of a specific, individual violation of law is collateral and subordinate to the main

[1] The fifth clause of the resolve contains such a requirement: "Witnesses shall testify only at private hearings and the same provisions with reference to secrecy which govern proceedings of a grand jury shall govern all proceedings of the commission."

object of the inquiry. . . . The existence of such a possibility does not change the investigation from a legislative to a criminal one." In *Matter of Di Brizzi*, 303 N. Y. 206, 216, it was said, "The fact that the Attorney-General and the members of the Crime Commission, in determining whether there exists a relationship between organized crime and units of government, may find it necessary to inquire as to whether individual crimes have been committed does not, as petitioner urges, render the investigation unconstitutional as a usurpation of the traditional province of the grand jury in each county of the State. This is a *general* investigation into *organized* crime and its relation to government." See *Washington* v. *Superior Court*, 40 Wash. 2d 502.

In *Eggers* v. *Kenny*, 15 N. J. 107, it was held that an investigating committee of the Board of Commissioners of Jersey City, which was a legislative body, might conduct an inquiry in aid of its proper legislative functions, even though the subject of inquiry might also be the proper concern of the courts and grand juries in their enforcement of the criminal laws. In so doing the court overruled an earlier case holding to the contrary because of its "disastrous effects" (p. 119).

6. The plaintiff asserts that Res. 1962, c. 146, is so broad as to allow the commission, which is not composed of legislators, to inquire into corrupt practices in connection with the election of members to the General Court and, to the extent that it does, is in violation of the Constitution, Part II, c. 1, § 2, art. 4, and Part II, c. 1, § 3, art. 10. He relies upon *Dinan* v. *Swig*, 223 Mass. 516, which concerned the courts. The commission is not a court. *Commonwealth* v. *Benoit*, Mass. , .[1] We do not interpret the re-

[1] Mass. Adv. Sh. (1964) 221, 225.

solve as conferring power to adjudge corruption in the election of members to the General Court. It must be construed, as is possible, so as to avoid reasonable constitutional doubts. *Commonwealth* v. *Benoit, supra,* .[2] The commission, of course, is not engaged in inquiring into corrupt practices in the election of members of the General Court. See *Ashley* v. *Three Justices of the Superior Court,* 228 Mass. 63, 81.

7. Violation of art. 12 of the Declaration of Rights and of the Fourteenth Amendment of the Constitution of the United States is charged by the plaintiff because, it is said, the resolve creates a crime which lacks certainty and definiteness. For this the reason assigned is that the resolve extend the circumstances in which a criminal offence can be found to have been committed, the offence being contempt for failure to answer a summons or failure to testify. Assailed are the stated purposes of the resolve, namely, "the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels."

(a) At the outset, we shall put at rest the contention that the resolve creates a new criminal offence. It does not. Failures to respond to a summons or to testify, in and of themselves, are not offences which, without more, make a witness subject to the penalties provided by G. L. (Ter. Ed.) c. 233, §§ 10, 5. Such failures merely make him subject to a court order compelling attendance and the giving of testimony. *Commonwealth* v. *Benoit,* Mass. , .[3]

(b) The plaintiff was not summoned to testify as to "organized crime," although these words are well enough understood to be in the title of numerous articles in legal

[2] Mass. Adv. Sh. (1964) 221, 225.

[3] Mass. Adv. Sh. (1964) 221, 226.

periodicals.[1] In *Matter of Di Brizzi*, 303 N. Y. 206, there was a Governor's executive order naming members of "the New York State Crime Commission to investigate and take action concerning the relationship between organized crime and Government" (p. 211). The court was able to discuss the subject without expressing doubt as to the meaning of the words "organized crime" (pp. 214, 215, 216, 217).

The purpose for which the plaintiff was summoned was to give testimony as to "corrupt practices in government." This is an adequately understandable area for legislative investigation and remedial action. While succinct, the words are sufficiently definite to make clear to a witness, if he knows right from wrong, the purpose of the inquiry and to enable proper interrogation of witnesses. Surely, the

[1] Hodson, Organized Crime, American Crim. L. Q., Vol. 2, No. 1, p. 5 (published by Section of Criminal Law, American Bar Association, and School of Law, University of Kansas). Lumbard, Local and State Action against Organized Crime, Annals of the American Academy of Political and Social Science, May, 1963, p. 82; Miller, A Federal Viewpoint on Combating Organized Crime, *id.* at 93; Ploscow, New Approaches to the Control of Organized Crime, *id.* at 74; Sellin, Organized Crime: A Business Enterprise, *id.* at 12; Woetzel, An Overflow of Organized Crime: Mores versus Morality, *id.* at 1; Strong, New England: The Refined Yankee in Organized Crime, *id.* at 40; Tyler, An Interdisciplinary Attack on Organized Crime, *id.* at 100. Patterson, Organized Crime, 18 Texas Bar J. 409. Pollner, Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering, 28 Brooklyn L. Rev. 37. Johnson, Organized Crime: Challenge to the American Legal System, 53 J. Crim. L., Criminology and Police Science, 339; 54 J. Crim. L., Criminology and Police Science, 1. Keating, Organized Crime—What Can Congress Do about It? 51 J. Crim. L., Criminology and Police Science, 458. Tyler, The Roots of Organized Crime, 8 Crime and Delinquency, 325. Organized Crime and Illicit Traffic in Narcotics, Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 88th Cong., 1st Sess. (1963).

words are not so vague and uncertain as to permit us to rule that no proper questions material to the subject by any possibility could be framed at a hearing. Equally surely, the words constitute no valid reason for a person, immediately upon service of a summons, to attack the substance of the resolve before he has appeared and has been interrogated at all. When a witness appears at a hearing, he will have a suitable opportunity to challenge the propriety of any question. Should any issue reach the courts, the witness would have the benefit of the principle that "scrupulous care to respect the rights of a witness is mandatory. Any real doubt should be resolved in his favor." *Corcoran* v. *Commonwealth*, 335 Mass. 29, 38.

The summons served upon the plaintiff, although not so limited, in particular sought evidence as to accounts in a specified bank of a State constitutional officer, of a State department, and of a public transportation authority. The import of this part of the summons, at least, could not reasonably be mistaken.

8. We have endeavored to cover all the points raised by the plaintiff even those which, like the prayer for declaratory relief, are in the nature of cryptic suggestions.

The decree of preliminary injunction is to be vacated. A declaratory decree is to be entered in accordance with this opinion.

So ordered.

Morris M. Goldings, Francis X. McLaughlin & Thomas J. O'Toole for the plaintiff.

Harold M. Willcox (*Marshall Simonds & Donald N. Sweeney* with him) for the defendants.

Walter Jay Skinner, Assistant Attorney General, for the Attorney General.

Appendix C.

MASSACHUSETTS GENERAL LAWS, CHAPTER 211.

SECTION 3. The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue writs of error, certiorari, mandamus, prohibition, quo warranto and all other writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel. [As amended by St. 1956, c. 707, § 1.]

MASSACHUSETTS GENERAL LAWS, CHAPTER 213.

SECTION 1A. Unless otherwise specifically provided, the superior court shall have original jurisdiction, concurrently with the supreme judicial court, of all proceedings, cases

and matters of which the supreme judicial court has jurisdiction, excepting those within the appellate jurisdiction of the full court, those provided for under section four of chapter two hundred and eleven, and those which cannot be transferred under section four A of said chapter. [As amended through St. 1962, c. 722, § 3.]

MASSACHUSETTS GENERAL LAWS (Ter. Ed.) CHAPTER 249.

SECTION 12. The supreme judicial court shall have jurisdiction of information in the nature of quo warranto filed by the attorney general against a person holding or claiming the right to hold an office or employment, the salary or compensation of which is payable by the commonwealth, a county, city or town.

SECTION 13. This chapter shall not affect the duty of the attorney general to proceed in all cases in which he might otherwise act.

Appendix D.

RESOLVES OF THE GENERAL COURT, 1962.

CHAP. 146. RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO CRIME AND CORRUPTION.

Resolved, That an unpaid special commission to consist of seven members appointed by the governor is hereby established to investigate and study as a basis for legislative action the existence and extent of organized crime within the commonwealth and corrupt practices in government at state and local levels, the existence of conditions which tend or may tend to prevent or interfere with the proper enforcement of the laws relating thereto, the existence of physical, legal and policy limitations on the powers and functions of those charged with the duty of enforcement of said laws and the extent to which the power of the government of the commonwealth in relation to the enforcement of said laws may or should be properly exercised at state and local levels.

No member shall hold any public office except that of justice of the peace or notary public or be a member or employee of any political committee. Not more than four of said members shall at any one time be members of the same political party. No person who has been convicted of a felony, gaming offense or any misdemeanor involving moral turpitude, nor any member of the immediate family of any such person, and no person who has served as a member of the special commission established under chapter one hundred of the resolves of nineteen hundred and fifty-three and revived and continued under chapter one hundred and forty-seven of the resolves of nineteen hundred and fifty-five shall be eligible for appointment to the commission.

The governor shall fill any vacancy in the commission but a vacancy shall not affect its powers and duties. The governor shall from time to time designate one of the members as chairman.

The commission shall request the commissioner of public safety to assist it in its investigation and study and he shall furnish any information in his possession which is so requested and he shall assign such assistants and investigators to said commission as it may request. The commission may require the co-operation of all agencies of state and local governments.

The commission may require by summons the attendance and testimony under oath of witnesses and the production before it of books and papers relating to any matter being investigated by it pursuant to the provisions of this resolve. Such a summons may be issued by the commission only upon a vote of the commission and shall be served in the same manner as summonses for witnesses in criminal cases issued on behalf of the commonwealth and all provisions of law relative to summonses issued in such cases shall apply to summonses issued under this resolve so far as applicable. Any justice of the supreme judicial court or of the superior court may upon application by the commission compel the attendance of witnesses summoned as aforesaid and the giving of testimony under oath before the commission in furtherance of any investigation under this resolve in the same manner and to the same extent as before said courts.

The commission shall establish rules of procedure governing the conduct of its hearings which shall be made available in printed form to each witness prior to his testimony. Witnesses shall have the right to be represented by counsel and shall before testifying be sworn. Witnesses shall testify only at private hearings and the same provisions with

reference to secrecy which govern proceedings of a grand jury shall govern all proceedings of the commission.

Upon order of the commission its counsel shall present to a grand jury for its action, or submit to the attorney general, a district attorney or other law enforcement agency, such evidence which has come to the attention of the commission as in the opinion of the commission warrants such presentation or submission.

The commission shall report to the general court annually on or before the first Wednesday in December in each year the results of its investigations and study and its recommendations, if any, together with drafts of legislation necessary to carry such recommendations into effect by filing the same with the clerk of the senate and shall file a final report not later than the last Wednesday in June, nineteen hundred and sixty-five. The commission shall also file a copy of each such report with the governor.

Approved July 27, 1962.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 612

EDMUND C. SHERIDAN, *Appellant,*

v.

ALFRED GARDNER, et al., *Appellees.*

On Appeal From the Superior Court of Massachusetts

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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1. Appellant has raised a substantial constitutional issue concerning the validity of the Resolve because of the mingling of legislative-investigatory and prosecutory functions.

The appellants position on this point is simply that the Resolve has been held to be in legal effect a statute, *Corcoran v. Commonwealth*, 335 Mass. 29; that under

this Resolve the liberty of the appellant is being unconstitutionally invaded by compelling his appearance; that this denial of liberty is in violation of the Fourteenth Amendment because, among other matters, the Resolve on its face (by authorizing the presentation of evidence to a grand jury by a legislative commission) and as construed and applied by the appellees (as made clear in the Commission's annual reports) combines prosecutory and legistative-investigatory functions so as to deny due process of law.

There can be no adequate state ground for circumventing the fededal due process issue. The Massachusetts courts have in fact ruled that the appellant must answer the summons of the Commission. In short, they have upheld the Resolve, as a statute, on its face and as construed and applied, despite appellant's claim of federal constitutional rights. This point was raised in the original petition, and is adequately set forth in the Jurisdictional Statement (pp. 7, 8), where it is urged that due process sets limits on the use of legislative investigatory agencies as a cloak for pursuing prosecutory purposes.

In this connection it is of the utmost importance to observe that the Massachusetts Supreme Judicial Court did not say the Commission-appellees had not presented or do not present evidence to grand juries and thereby attempt to secure indictments. The Massachusetts court said merely that the record *in this case* shows no such action (Jurisdictional Statement p. 8a). Appellant urges that if the question of the actual practice of the Commission becomes critical to the resolution of the case at bar, this Court should take judicial notice of relevant admissions by the Commission-appellees and its attorneys entered in the records

of other cases but which were not on record when the instant case was briefed for the Supreme Judicial Court. See: *Gardner* v. *Callahan,* — Mass. —, 196 NE 2d 301, Record, p. 45, Statement of Agreed Facts, Case No. 13,097; *Commonwealth* v. *Hanley,* Mass. Superior Court, Suffolk County Nos. 10272-86 (1964); *Commonwealth* v. *Giles,* Mass. Superior Court, Essex County, No. 54475 (1964). If judicial notice is not taken, it is urged that this case be remanded to the Massachusetts Superior Court for further hearing on this point should clarification of this question be essential to the adjudication of the case. See Wigmore on Evidence, Section 2579 (3rd ed. 1940); *Butler* v. *Eaton,* 141 U.S. 240.

Appellant is especially concerned about this matter because of the grossly misleading declaration contained in the Motion to Dismiss filed on behalf of the Commission (pp. 4, 5) denying that evidence developed by the Commission has been presented to the grand jury by the Commission or its counsel.

2. Appellant has properly raised a substantial issue whether the Resolve, on its face, enacts a bill of attainder. The substance of this point is set forth in the Jurisdictional Statement. Insofar as appellee's motion is based upon the argument that appellants standing to raise the issue need not be recognized because the Attorney General can file a writ of quo warranto, it is submitted that this does not make judicial review available at the instance of the affected class of persons. Nothing makes this clearer than the fact that the Attorney General has elected to defend the Resolve in this respect.

3. The Motion to Dismiss filed by the Attorney General of Massachusetts is not properly before this Court,

in that he is not a party to the case. Although the Attorney General received notice of these proceedings as required by Massachusetts G. L. (Ter. Ed.) c 231A, § 8, it is clear that under the aforesaid statute this notice does not make him a party, *City Manager of Medford* v. *Civil Service Commission*, 329 Mass. 323, 330, therefore the Attorney General has no standing to file motions in this case.

The questions raised in the Jurisdictional Statement are substantial and properly before this Court. Probable jurisdiction should be noted.

Respectfully submitted,

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